TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 165.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

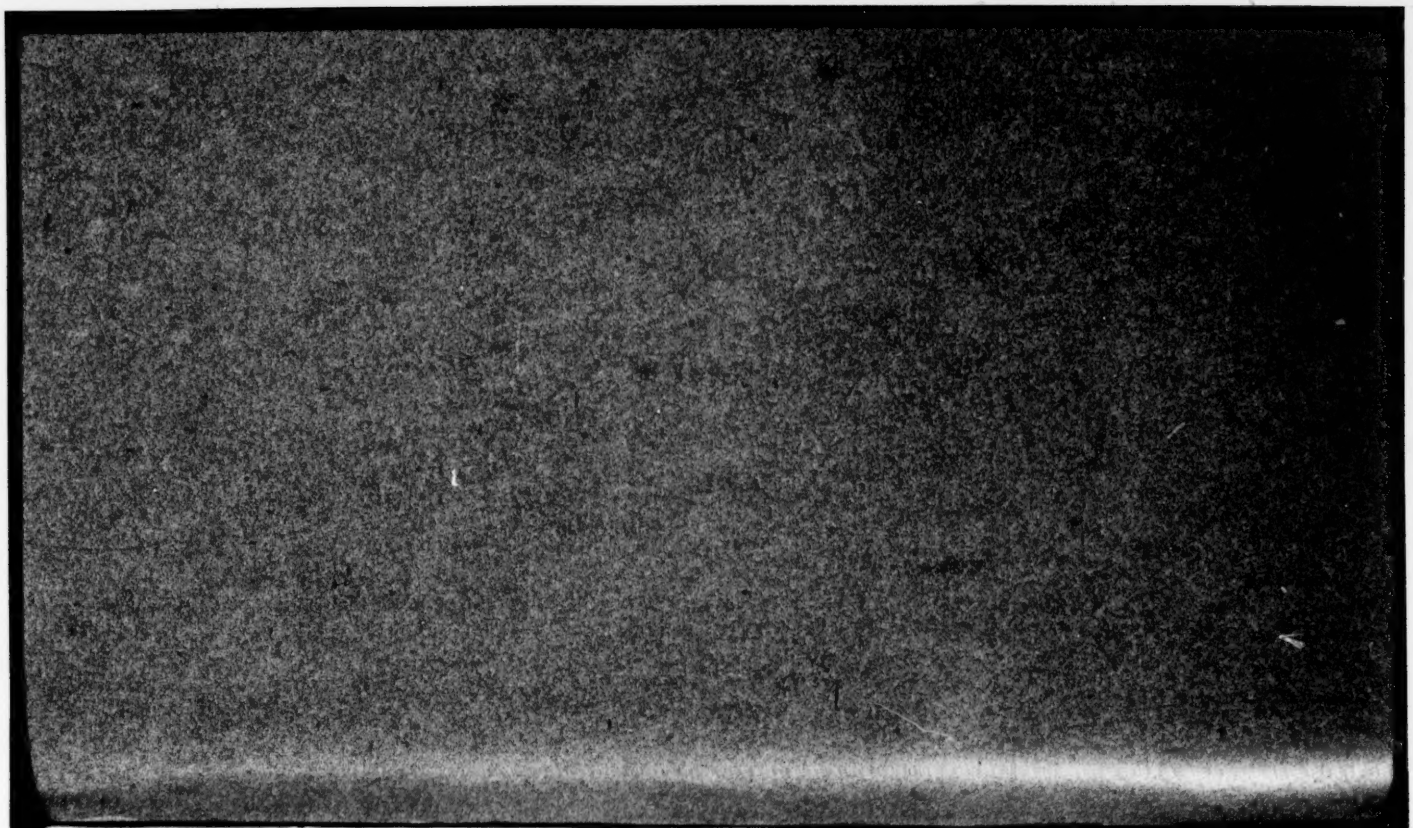
vs.

JENNIE M. METTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 26, 1895.

(17,913.)



(17,913.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption and style of cause	1	1
Transcript from State court	2	1
Plaintiff's original petition	2	1
Citation and sheriff's return	4	3
Petition for removal	5	4
Bond for removal	7	5
Order of removal	8	6
Bill of costs	8	7
Clerk's certificate	9	7
Plaintiff's first amended original petition	10	7
Defendant's second amended original answer	19	14
Plaintiff's amended first supplemental petition	23	16
Defendant's supplemental answer	25	18
Final judgment	26	19
Motion for new trial	28	20
Amended motion for new trial	31	22
Order extending time to file bill of exceptions	40	28
Order overruling motions for new trial and extending time to file bill of exceptions	40	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 26, 1901.

	Original.	Print
Plaintiff's remittitur	41	29
Assignment of errors	42	30
Bill of exceptions	49	35
Exception to ninth count of first amended original petition	49	35
Policy No. D 73372	51	37
Application	57	42
Testimony of Mrs. Jennie M. Mettler	62	46
R. D. Gage	72	53
Wm. A. Hunter, Sr.	74	56
Mrs. Birdie Yoakum *et al.*	76	56
J. B. Gibson	76	57
Exhibit A—Diagram	87	64
Testimony of F. M. Etheridge	90	66
George A. Knight	91	67
Statute of Pennsylvania	92	68
Testimony of R. W. Finley	92	68
Exhibit E—Comptroller's certificate	93	68
Testimony of W. B. Wortham	93	69
Treasurer's certificates	94	69
Land office certificate	95	70
Testimony of Mrs. R. S. Johnson	96	71
F. E. Booth	97	71
W. H. Dennis	98	73
Exhibit A—River record	99	73
Testimony of J. W. Prewit	102	75
Patrick Carson	104	77
Capt. A. D. Irvin	105	77
W. B. Oats	107	79
Mrs. E. J. Brady	108	80
Mrs. R. H. Kissee	109	81
Mrs. M. H. Manning	110	81
Miss Lula Irvin	110	82
John Schwarts	111	82
Mrs. J. B. Miller	111	83
A. M. Randolph	112	83
H. C. Slack	113	84
A. M. Randolph (recalled)	113	84
D. H. Scott	116	86
R. S. Johnson	118	87
Lee Johnson	119	88
H. B. Taylor	119	89
D. G. Wallace	120	89
J. A. Floerish	130	97
R. A. Henry	131	98
A. H. Pierson	132	98
C. H. Spencer	133	100
Lee Johnson	136	101
H. C. Slack	136	102
A. J. Brown	142	106
W. A. Hunter, Sr.	144	108
R. S. Johnson	145	108
H. B. McDonald	148	111
John B. Littler	148	111

	Original.	Print
Defendant rests	151	113
Testimony of Mrs. Mettler (recalled)	151	114
J. B. Gibson	152	114
W. M. Alexander	153	115
Instruction asked by defendant	154	116
Charge of the court	154	116
Further instructions asked by defendant	156	117
Judge's certificate to bill of exceptions	158	119
Exhibit E and Exhibit A—Photograph	159	119
E^1—Photograph	160	119
8—Photograph	161	119
A^1—Photograph	162	119
A^2—Photograph	163	119
A^3—Photograph	164	119
Petition for writ of error and allowance	165	119
Bond for writ of error	166	120
Citation and service (original)	167	121
Acceptance of service (original)	168	122
Writ of error (original)	169	122
Clerk's certificate	170	123

1 Caption.

Be it remembered that at a term of the circuit court of the United States in and for the northern judicial district of Texas and in the fifth circuit of the United States, begun and holden at Dallas, Texas, on the fourth Monday in May, the same being the 28th day of said month, in the year one thousand nine hundred—present and presiding, the Honorable Edward R. Meek, United States district judge for the northern district of Texas—and which term was adjourned on the sixth day of July, A. D. 1900, the following proceedings were had and the following cause came on for trial and was tried, viz:

Style of Cause.

JENNIE M. METTLER
versus
THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. } No. 2118.

2 *Transcript from Dallas Co., Texas.*

Filed January 8, 1898.

Plaintiff's Original Petition.

Filed Dec. 2nd, 1897.

THE STATE OF TEXAS, }
County of Dallas. }

In the District Court of Dallas County, Texas, — Judicial District.

To the honorable judge of said court:

Your petitioner, Jennie M. Mettler, hereinafter styled plaintiff, complaining of The Fidelity Mutual Life Association of Philadelphia, hereinafter styled defend-, respectfully represents:

That plaintiff is a *feme sole* and is a resident citizen of Reeves county, Texas, and that the defendant is a life insurance corporation, with its home office in the city of Philadelphia, Pennsylvania; that it is now and has been since the first day of October, 1896, and for a long time previous thereto engaged in the business of life insurance in the State of Texas, under and by virtue of the laws thereof, with a State agent in Dallas county, Texas, to wit, A. J. Brown, which agent now resides in Dallas county, Texas, and has an office in the city of Dallas, from which office he conducts the business of said association in the State of Texas.

Plaintiff represents that heretofore, to wit, on the 28th day of October, 1896, one Wm. A. Hunter, brother of plaintiff herein, and in whose life this plaintiff had an insurable interest, did make his three written applications to the defendant association for fifteen thousand dollars insurance on his life, being for the sum of $5,000

each, according to the printed forms prescribed by and used by the said association; that subsequent thereto, on the 31st day of October, 1896, for a stipulated annual premium provided for in the three several policies issued by the defendant association to said Wm. A. Hunter, viz., $63.15 on each policy, of which amount the said Wm. A. Hunter paid to defendant on each policy the sum of $32.55, being the semi-annual premium, which payment covered the life of the assured, under the terms of said policies, from October 28th, 1896, to April 28th, 1897, the said defendant association did then and there issue and deliver to the said Wm. A. Hunter its three several policies of insurance, numbered respectively D–73372,
D–73373, and D–73374, each for the sum of $5,000, and each
3 of said policies being payable to the plaintiff herein, Jennie M. Mettler, whereby the defendant association became liable to pay, according to the provisions of said policies, the sum of $15,000.00 to the plaintiff after the death of her said brother, Wm. A. Hunter, upon the surrender of said policies properly receipted.

Plaintiff represents that subsequent to the issuance of said policies, to wit, between the 3rd day of December, 1896, and the 10th day of December, 1896, the brother of plaintiff herein, Wm. A. Hunter, departed this life, being drowned in the Pecos river, near what is known as "Texas bend," in said river, while camping on his way from Pecos, in Reeves county, Texas, to Mentone, in Loving county, Texas.

Plaintiff avers that as soon as she was apprised of the death of her said brother, as aforesaid, in December, 1896, she notified the defendant association of the fact, and, at the request of plaintiff, defendant sent its agent and representative to interview plaintiff, and plaintiff did, under the provisions of said policies, prepare and submit to the defendant association proper affidavits and proofs of loss, which were duly considered by the defendant, and offered to receipt the policies and deliver them to def't upon payment. Plaintiff represents that, notwithstanding her action in the premises, she is advised, believes, and so alleges, that the defendant association has denied any liability whatever in the premises, and defendant has notified plaintiff and her attorneys that it will not pay the claim of plaintiff herein except at the end of litigation.

Wherefore, the premises considered, plaintiff prays that the said defendant be duly cited to answer this petition by service on said A. J. Brown, residing in Dallas county, Texas; that upon a hearing hereof plaintiff have judgment against defendant for said principal sum of $15,000.00, together with interest and damages provided by law, for costs of suit, and for such other and further relief, general and special, as — the court may seem fit and proper.

R. D. GAGE AND
ALEXANDER, CLARK & HALL,
Attorneys for Plaintiff, Jennie M. Metler.

4 Filed 2 day of Dec., A. D. 1897.

H. W. JONES,
Clerk Dist. Court, Dallas Co.,
By R. M. HODGES, *Deputy.*

Citation.

Issued Dec. 2nd, 1897.

The State of Texas to the sheriff or any constable of Dallas county, Greeting:

You are hereby commanded to summon The Fidelity Mutual Life Association of Philadelphia, Penn. (A. J. Brown, agent), to appear before the district court of the 44th judicial district of Texas, at the next regular term thereof, to be held in the court-house, in the city of Dallas, on the first Monday in January, A. D. 1898, then and there to answer to the petition of Jennie M. Mettler, filed in said court on the 2nd day of December, 1897, against the said The Fidelity Mutual Life Association of Philadelphia, Penn., for suit, said suit being numbered 16787, the nature of which demand is as follows, to wit:

Plaintiff sues the defendant for $15,000, and alleges that on the 28th day of October, 1896, the def't issued its three policies of insurance No. D. 73372, D. 73373, and D. 73374, insuring the life of her brother, Wm. A. Hunter, for the term of one year. Plaintiff alleges that her said brother died during the life of said policies, and that the def't now refuses to pay said sum of $15,000.00 to her, and that she had and has an insurable interest in said policies; and you will deliver to the said The Fidelity Mutual Life Association of Philadelphia, Penn., a true copy of this citation.

Herein fail not, but have you then and there this writ, showing how you have executed the same.

Witness H. W. Jones, clerk of the district court of Dallas county. Given under my hand and seal of office, at Dallas, this 2 day of Dec., 1897.

H. W. JONES,
Clerk District Court, Dallas County,
[L. S.] By R. M. HODGES, *Deputy.*

Issued this 2 day of Dec., 1897.

H. W. JONES, *Clerk,*
By R. M. HODGES, *Deputy.*

5 *Sheriff's Return.*

Sheriff's return.

Came to hand on the 2nd day of Dec., 1897, and executed on the 4th day of Dec., 1897, by delivering to A. J. Brown, agent of The Fidelity Mutual Life Association of Philadelphia, Penn., the within-named defendant, in person, a true copy of this writ.

BEN. E. CABELL,
Sheriff Dallas County,
By A. L. SIMPSON, *Deputy.*

Fees.

Serving copy	$ 75
Mileage	10
Total	$ 85c.

Petition for Removal.

Filed Jan. 4th, 1898.

In the District Court, Dallas County, 44th Judicial District.

JENNIE M. METTLER, Plaintiff,
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION, Defendant. } No. 16787.

To the honorable district court, 44th judicial district, of Dallas county, Texas:

Your petitioner, The Fidelity Mutual Life Association, respectfully shows to this honorable court that it is the defendant in this suit, which was filed herein December 2nd, 1897, and which is of a civil nature, and that the matter and amount in dispute in this cause exceeds, exclusive of interests and costs, the sum or value of $2,000.00.

That the controversy herein is wholly between citizens of different States, and which can be fully determined as between them; that the plaintiff, Jennie M. Mettler, was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Texas and of Reeves county, in said State, and that your petitioner, The Fidelity Mutual Life Association, was at the time of the commencement of this suit, and still is, a resident of and citizen of Pennsylvania, and of no other State, and a non-resident of the State of Texas, and that it is a corporation created and incorporated under and
6 by virtue of the laws of the State of Pennsylvania, and has its domicile, place of business, home office, and citizenship and residence in the city of Philadelphia, in said State of Pennsylvania, and that your petitioner desires here now, before it is required by the laws of this State or rules of this court to plead or answer in this suit in this court and before the trial thereof, to remove this suit into the next circuit court of the United States to be held in the northern district of Texas; that it is not so required to appear or answer before January 4th, 1898.

And your petitioner offers herewith good and sufficient sureties for its entering into the circuit court of the United States for the northern district of Texas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto, and for entering special bail in said suit if special bail was originally requisite therein.

And your petitioner therefore prays that the said sureties and bond may be accepted; that this said suit may be removed into the next circuit court of the United States to be held in the northern

district of Texas, pursuant to the statutes of the United States made and provided, and that no further proceedings may be had herein in this court; and it will ever pray.

THE FIDELITY MUTUAL LIFE ASSOCIATION,
By A. J. BROWN, *State Agent.*
PERKINS, GILBERT & PERKINS,
Attorneys for Petitioner.

STATE OF TEXAS, }
County of Dallas. }

A. J. Brown makes oath and says that he is the State agent for Texas of The Fidelity Mutual Life Association, petitioner, and that said petitioner is a corporation incorporated as stated in the foregoing petition; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters he believes them to be true.

A. J. BROWN.

Subscribed and sworn to before me this 3rd day of January, 1898.

[SEAL.] J. M. HARDIE.
Notary Public, Dallas County, Texas.

7 Filed 4 day of Jan., A. D. 1898.

[L. S.] H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By CALHOUN KNOX, *Deputy.*

Bond for Removal.

Filed Jan. 4th, 1898.

In the District Court of Dallas County, Texas, 44th Judicial District.

JENNIE M. METTLER }
vs. }
THE FIDELITY MUTUAL LIFE ASSOCIATION. }

Know all men by these presents that we, The Fidelity Mutual Life Association of the City of Philadelphia, in the State of Pennsylvania, as principal, and A. J. Brown and John Hardie and B. W. Bryan, of the city of Dallas and State of Texas, as sureties, are held and firmly bound unto Jennie M. Mettler in the penal sum of one thousand dollars ($1,000.00); for the payment whereof, well and truly to be made, unto the said Jennie M. Mettler, her heirs, representatives, and assigns, jointly and severally, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Upon condition, however, that whereas the said The Fidelity Mutual Life Association has filed its petition in the forty-fourth judicial district court of the State of Texas, at Dallas, for the removal of a certain cause therein pending, No. 16787, wherein the

said Jennie M. Mettler is plaintiff and the said The Fidelity Mutual Life Association is defendant, to the circuit court of the United States in and for the northern district of Texas:

Now, if the said The Fidelity Mutual Life Association shall enter into the said circuit court of the United States on or before the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall there appear and enter special bail in said suit if the same was originally requisite in said cause, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof we have hereunto set our hands and
8 seals this the 3rd day of January, 1898.

THE FIDELITY MUTUAL LIFE ASSOCIATION,
By J. E. GILBERT, *Its Att'y.* [L. S.]
A. J. BROWN. [L. S.]
JNO. HARDIE. [L. S.]
B. W. BRYAN. [L. S.]

Approved this third day of January, 1898.

EDWARD GRAY,
Judge 44th Judicial District Court.

Filed 4 day of Jan., A. D. 1898.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Tex.,
By CALHOUN KNOX, *Deputy.*

Order of Removal.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION. } No. 16787.

JANUARY 4TH, 1898.

On this day this cause coming on to be heard upon the petition of the *the* Fidelity Mutual Life Association to remove same into the circuit court of the United States for the northern district of Texas, said petition being by the court heard and duly considered, and it appearing to the court that a good and sufficient bond had been filed, and that said petition shows good and sufficient ground for removal:

It is therefore ordered by the court that the prayer of the petitioner be, and the same is hereby, granted and its bond approved, and that this cause be removed to the circuit court of the United States for the northern district of Texas; and the clerk of this court will make a transcript of the record in this case, to be filed in the United States circuit court aforesaid.

EDWARD GRAY,
Judge 44th Judicial District of Texas.

Bill of Costs.

Bill of costs.

Filing petition and docketing		$ .30
Iss. 1 cit. & copy cit		1.00
9 Sheriff Cabell serving cit		.85
Filing petition for removal		.10
Filing bond for removal		.10
Entering order removing to U. S. court		.25
Making transcript for removal to U. S. court		3.00
		$5.60

Clerk's Certificate.

THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk of the district court in and for Dallas county, Texas, do hereby certify that the foregoing 8 pages contain a true and correct copy of all the proceedings in the said numbered and entitled cause, as the same now appears of record and on file in my office.

Given under my hand and official seal, at office in the city of Dallas, Texas, this the 8th day of January, A. D. 1898.

H. W. JONES,
Clerk Dist. Courts, Dallas County, Texas,
[SEAL.] By ELMO TRIMBLE, *Deputy.*

The foregoing has the following endorsements, to wit:

No. 2118. In the United States circuit court, northern district of Texas, at Dallas. Jennie M. Mettler *vs.* Fidelity Mutual Life Ass'n of Philadelphia. Transcript from Dallas Co., Texas. Filed Jan'y 8, 1898. J. H. Finks, clerk, by Chas. H. Ledbum, deputy clerk.

10 *Plaintiff's First Amended Original Petition.*

Filed November 11, 1899.

In the U. S. Court for the Northern District of Texas, at Dallas.

MRS. JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. } # 2118.

Now comes the plaintiff, Jennie M. Mettler, by attorneys, in the above-entitled cause, and, with leave of the court first had and obtained, files this her first amended original petition in lieu and in substitution of her original petition filed herein on the 2nd day of December, 1897, and for cause of action alleges as follows:

1. Plaintiff complains of The Fidelity Mutual Life Association of

Philadelphia, and respectfully shows to the court that she is a *femme sole*, and is a resident citizen of Reeves county, Texas, and that the defendant, The Fidelity Mutual Life Association of Philadelphia, is a corporation duly and legally incorporated under and by virtue of the laws of the State of Pennsylvania, with its principal office and locus in the city of Philadelphia, aforesaid, and that said defendant association has a permit to do business in the State of Texas; that it is now, and has been since the 28th day of October, 1896, and for a long time prior thereto, engaged in the business of life insurance in the State of Texas under and by virtue of the laws thereof, with its State agent in the city of Dallas, Dallas county, Texas, to wit, A. J. Brown, who has an office in the city of Dallas, from which office he conducts the business of said association in the State of Texas.

2. That heretofore, to wit, on the 28th day of October, 1896, plaintiff's brother, William A. Hunter, did make his three written applications to the defendant through its said State agent, A. J. Brown, who solicited said insurance, for $15,000.00 insurance on his life, each application being for the sum of $5,000.00, and being made upon the printed forms prescribed by and used by said defendant, which applications are in the possession of the defendant, and it is here notified to produce the same upon the trial of this cause or secondary evidence thereof will be introduced by the plaintiff.

That on said 28th day of October, 1896, and prior thereto, plaintiff was a widow, and that her said brother, William A.
11 Hunter, was a single man, never having been married; that their home was at Pecos, Texas, and that her said brother made said three applications for insurance for her benefit.

3. Plaintiff alleges that on the 31st day of October, 1896, and prior thereto, she and her said brother were residents of Reeves county, Texas, as aforesaid, and that the defendant, The Fidelity Mutual Life Association of Philadelphia, on said day, in consideration of the three several sums of $32.55 each, paid by the said William A. Hunter to the defendant, and of the further three several sums of $32.55 each, to be paid to it semi-annually upon the 28th day of the months of April and October in every year for a period of ten years from October 28th, 1896, made, executed, and delivered to the said William A. Hunter its three several policies of insurance in writing, numbered, respectively, D–73372, D–73373, and D–73374, wherein it insured the life of William A. Hunter in the sum of $15,000.00—that is, $5,000.00 by each policy—for the benefit of the plaintiff, and promised to pay said $15,000.00 to plaintiff on the death of the said William A. Hunter, upon the surrender of said policies properly receipted, within ninety days after the acceptance of due and satisfactory proof of the death of the said William A. Hunter.

4. That the said William A. Hunter died on or about the 4th day of December, 1896; that the plaintiff duly notified the defendant, in writing, of his death, and the defendant is requested to produce said notice upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff upon the hearing hereof; that

the plaintiff did thereafter, on or about the — day of January, 1897, promptly furnish to the defendant due and satisfactory proof, at its home office in the city of Philadelphia, of the death of her brother, the said William A. Hunter, and of the just and lawful claim, both as to plaintiff's rights and interests and the justness of the claim, in accordance with the provisions of said policies, and offered to surrender said policies, when properly receipted, when the same were paid; that the defendant received said proofs of death, and accepted the same, and retained the same for more than said ninety days, making no complaint that the same were not due and satisfactory proof; and plaintiff shows that said proofs of
12 death are in the possession of the defendant, and it is here given notice, as it has been heretofore in writing, to produce said proofs of death upon the trial of this cause, or secondary evidence thereof will be introduced by her.

That at the time of the death of the said William A. Hunter, as aforesaid, the premiums due upon said policies had been paid and the said William A. Hunter had, in all respects, complied with the conditions and provisions of said policies, whereby the defendant became liable and promised to pay to the plaintiff, according to the provisions of said policies, said sums of money therein specified, and yet the defendant wholly failed and refused to pay said policies within ninety days after accepting said proofs, as it agreed in its policies so to do, and, though often requested, has never paid the same or any part thereof.

Plaintiff avers that the said William A. Hunter met his death, as aforesaid, on or about the 4th day of December, 1896, in the waters and quicksands of the Pecos river, being drowned near what is known as the "Texas bend" in said river, while camping with a two-horse wagon on his way from Pecos, in Reeves county, Texas, to Mentone, in Loving county, Texas, his drowning not being discovered until December 27th, 1896, and his body never being recovered.

5. That upon receiving from plaintiff, as aforesaid, notice of the death of the said William A. Hunter, it was the duty of the defendant, according to the terms of its said policies, to furnish plaintiff blank forms for proof of death and claim, it beiung usual for life insurance companies to furnish same, and it being provided by said policies that plaintiff should make said proof of death and claim upon such blank forms, proper blank forms to be furnished by the said defendant, as aforesaid.

Plaintiff shows that the defendant, upon receiving said notice of the death of her brother, sent its general agent, representative, and adjuster, R. C. Milliken, to Pecos, Texas, with printed blank forms for proof, to furnish plaintiff said forms and to receive the proof when executed; that the said R. C. Milliken, for the defendant, came to Pecos in response to said notice, saw plaintiff, who was a widow, without a male relative in Texas, and wholly ignorant as to how to make out said proof of death and claim, and represented to her that he would advise her of the necessary requirements of and
13 information to be embraced in her said proof of death and claim, and aid her in making out the same. Plaintiff avers

that knowing her own ignorance in reference thereto, and having been induced to believe by the said R. C. Milliken that he would act in the best of good faith in the matter, plaintiff, at his request, gave him full information in reference to said William A. Hunter leaving Pecos and being drowned in the Pecos river, and of where he had spent his life, and in what business, and information where he could obtain his latest photograph, and gave him full data in reference to the names and address of his father, brothers, sisters—that is, full information of the family—and where and in what business they had spent their lives, all of which said R. C. Milliken stated was necessary because the body of William A. Hunter was not found; that said R. C. Milliken, having been advised, as aforesaid, himself wrote out the answers to the questions in said blank proofs of death and filled out all blanks therein, representing to the plaintiff that he had written all necessary matters therein, and plaintiff, believing the same to be true and relying upon the said representations, as requested, signed and made oath to same before J. B. Gibson, of Pecos, district clerk in and for Reeves county, said Milliken having selected said officer to administer said oath, and on the same day delivered the same to him, the said R. C. Milliken, he being duly authorized by the defendant to receive the same, and the same he promptly furnished the defendant at its home office, and the same is now in the possession of defendant, and it is given notice to produce the same upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff.

Plaintiff shows that about the day after and the secon- and third days after receiving said "proofs of death" said R. C. Milliken called to see plaintiff with typewritten questions, also in reference to the death of William A. Hunter, and then and there prepared and wrote her answers thereto, and had her sign and make oath thereto before said officer, J. B. Gibson, and received the same, stating to plaintiff that the printed form was not sufficient, and that said affidavits were necessary in the making of the proofs of the death of William A. Hunter, of which affidavits and the contents thereof the said Milliken promptly advised defendant, and furnished the same to the home office of the defendant.

14 Plaintiff avers that after the proofs of death and accompanying affidavits were prepared and executed, as aforesaid, the said R. C. Milliken then and there received and accepted the same at Pecos, Texas, for the defendant, as he was sent to Pecos with authority to do, without an intimation that they were not satisfactory, but, to the contrary, he led plaintiff to believe that the same were satisfactory, and that the said policies would be paid; all of which was done with the full knowledge, consent, and approval of the defendant company.

Plaintiff avers that, in addition to her proof of death and claim made and delivered to R. C. Milliken, as aforesaid, and as a part thereof, at the special instance and request of the defendant, made by and through its agent and representative, Abb Landis, defendant was furnished, on or about the — day of January, 1897, a letter containing a full written statement in reference to the death of her

brother, written by plaintiff to her father, W. A. Hunter, of Homer, Ohio, on December 30, 1896, and obtained by the defendant on the day and year aforesaid, at its home office in Philadelphia.

Plaintiff says that if her said proof of death and claim are not satisfactory, as pleaded in defendant's answer herein, which she denies, it is because of the fraud and deceit aforesaid of the said R. C. Milliken in the preparation of the same.

Plaintiff avers that the defendant adopted and ratified the acts, representations, statements, promises, and conduct of said Milliken, and is bound thereby.

Plaintiff shows that on account of the fact that no one saw said deceased, William A. Hunter, when he was drowned, or his body thereafter, his body never being recovered or buried, it was impossible for plaintiff to furnish to the defendant other facts for proof of death than she did, as aforesaid, which plaintiff avers were reasonably sufficient and should be satisfactory to the defendant; that the defendant refused to pay said policies because it claimed that said William A. Hunter was not drowned, thereby relieving plaintiff from the duty of making any other or further proof than that which was submitted to the defendant by plaintiff; that the defendant still insists that the said Hunter is alive, and sets up the same as one of the defenses in its answer filed herein; that defendant's said agent, and through him the defendant, was fully advised of all the facts and evidence upon which plaintiff relied to establish the death of her said brother; that all of the proofs of said loss were, as aforesaid, gotten up and prepared by said agent; that if they are not sufficiently full or omitted anything necessary it was on account of the failure and fraud of said agent; that as defendant refused to pay said policies without direct evidence of the death of the said William A. Hunter, and the manner of his death made it impossible to produce that character of proof, it became impossible for her to furnish proof satisfactory to defendant, though, as aforesaid, the proof so made was and should be held, under the circumstances of this case, sufficient to meet the terms of said policies requiring plaintiff to furnish proof of the death of her said brother.

Plaintiff further says that on account of the acts and conduct of the said R. C. Milliken and defendant's other agents and officers, pretending that defendant was so strongly convinced of the fact that said assured was not dead, that no proofs which she could submit would in anywise change defendant's determination not to pay said policies; that by reason thereof, in justice and right, defendant should now be estopped from attacking the sufficiency of said proof of death and should not now be permitted to interpose the same as a defense herein.

6. Plaintiff avers that the defendant is estopped from asserting that her proof of death and claim is not satisfactory, for the reason that after it was furnished to the defendant, as aforesaid, and the surrender of the policies, properly receipted, offered by plaintiff upon the payment thereof, defendant in nowise notified plaintiff that the same was not satisfactory within ninety days thereafter, nor within

any reasonable time, and the policies became then and there, to wit, ninety days after said proof was furnished to defendant, due and payable, and defendant is now estopped from denying the sufficiency of said proof, having received and accepted the same without notifying the plaintiff within the time required by said policies that the same were not satisfactory.

7. Plaintiff further says that the defendant has waived proof of death and claim of any character whatsoever by denying any liability on said policies, for that on or about the day after receiving said proof of death and affidavits, as aforesaid, the defendant did, by and through its said representative, R. C. Milliken, acting for
16 the defendant in the usual scope of his duties and with authority, state to the plaintiff, at Pecos, Texas, in substance, that he had only been pretending to believe that William A. Hunter was dead; that he was not dead; that defendant would find him in a few days, and plaintiff states that while this conversation was going on the telegraph messenger called at the house and asked if said Milliken was there, and gave him a telegram, which, after reading, said Milliken handed to plaintiff, requesting her to read the same. The telegram was sent from defendant's State agency of office at Dallas, Texas, and was signed by one of defendant's representatives, whose name plaintiff cannot recall; and the substance of the telegram was that William A. Hunter had been found and arrested and would be brought at once to Pecos; that said R. C. Milliken urged that if plaintiff would cancel and surrender said policies before her brother was turned over to the sheriff at Pecos that he, the said Milliken, would protect him and her from criminal prosecution.

Plaintiff shows that said telegram was false and fraudulent and together with the language of defendant's representative, Milliken, constituted not only a denial of any liability whatever, but an attempt on defendant's part to coerce, scare, and frighten plaintiff into admitting defendant was not liable and relieving it from liability by cancelling and surrendering said policies, all of which facts plaintiff is ready to verify, and pleads the same as a complete waiver of any proof of death and claim whatsoever; and plaintiff gives the defendant notice, as it has heretofore done, to produce said telegram upon the trial of this cause, or secondary evidence thereof will be made.

8. Plaintiff shows that, upon receipt of said notice of the death of William A. Hunter, defendant's said general agent and adjuster, R. C. Milliken, came to Texas and made a personal examination of and into all the facts and circumstances in reference to the death of said William A. Hunter, and though the same were amply sufficient to satisfy any reasonable person that W. A. Hunter was, as plaintiff had notified defendant, dead, he had said telegram sent to himself, and sho-ed the same to plaintiff, and by the false and deceitful means aforesaid endeavored to frighten plaintiff into cancelling and surrendering to him said policies and releasing his company from its liability, and denied any liability whatever on the part of

defendant; of which conduct the defendant was promptly
17 advised by their said representative, and, instead of repudiating the same, defendant has acted upon the same and ratified the same, whereby defendant waived said preliminary proofs of death and should not now be heard to say that it is not liable upon its said policies because said proofs of death furnished by plaintiff, as aforesaid, are not satisfactory to it.

9. Plaintiff shows that defendant has wrongfully failed and refused and still fails and refuses to pay said policies or any part thereof, though often requested so to do, to plaintiff's damage $21,697.60.

Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest, and damages due plaintiff by defendant on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon defendant for failing to pay the loss within the time specified in the policies was first enacted by the legislature of Texas on May 3rd, 1874; it was carried into the Revised Statutes of 1879, and again into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be void. Plaintiff shows that the policies sued on were issued October 31st, 1896, after said statute of 1895 went into effect; that the defendant, as a foreign corporation, was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed and was when it issued said policies obligated to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas, whereby it became bound and is
18 liable to plaintiff for said twelve per cent. damages and reasonable attorneys' fees. Plaintiff shows that it appeared to the legislative mind of the State of Texas that the life-insurance business, as conducted and carried on in the State by such corporations, was detrimental to the welfare of its people, and, as the State had a right to do by the exercise of its police power, it prescribed said provisions of the law of 1895 as a part of defendant's contract herein, whereby defendant became bound and liable to plaintiff for said twelve per cent. damages and attorneys' fees.

Wherefore plaintiff prays that on a hearing hereof, the defendant having already been cited, that she have judgment for $15,000.00, the face of said policies, with legal interest thereon, together with twelve per cent. damages thereon, and reasonable attorneys' fees, namely, ten per cent. of the amount recovered; for all costs of suit,

and for such other and further relief, general and special, as to the court may seem fit and proper.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

The foregoing has the following endorsements, to wit:

2118. Mrs. Jennie M. Mettler *vs.* The Fidelity Mutual Life Association of Philadelphia. Plaintiff's first amended original petition. Filed 11 day of Nov., 1899. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Alexander, Clark & Thompson, attorneys-at-law, Dallas, Texas.

19 *Defendant's Second Amended Original Answer.*

Filed May 28, 1900.

In the United States Court for the Northern District of Texas, at Dallas.

JENNIE M. METLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } # 2118.

Now comes the defendant, — leave of the court, and amends its pleadings heretofore filed herein and files this its second amended original answer in lieu of all other pleadings heretofore by it filed.

1st. Defendant excepts to plaintiff's petition and says same does not contain facts sufficient to constitute cause of action against it, and of this it prays the judgment of the court.

2nd. (*a.*) Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorneys' fees and statutory damages in this action, because such attorneys' fees and damages are asserted and claimed under a statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said constitution and provisions of the constitution of the State of Texas, and therefore void.

(*b.*) Defendant specially excepts to that portion of paragraph No. 2 in said petition which avers that A. J. Brown solicited insurance, because it is immaterial what solicitations were made so long as they eventuated in a contract.

(*c.*) Defendant specially excepts to all of paragraph No. 5 in said petition, because the same presents no issuable fact, because the averments therein are immaterial and irrelevant to any issue and because they are calculated to prejudice the defendant on the trial of the case, and because there is no issue in the case as to the sufficiency of the preliminary proofs or of any preliminary proofs.

(*d.*) Defendant also specially excepts to paragraph No. 6, because there is no issue in the case involving the question of estoppel.

(*e.*) Defendant also excepts to paragraph No. 7, because the allegations therein are immaterial and irrelevant to the issue, contain

no issuable facts; because there is no issue thereon; because same is calculated to prejudice the defendant on the trial hereof.

20 (*f.*) The defendant also especially excepts to paragraph No. 8 of said petition for the reasons above indicated, and prays that each one of these special demurrers be sustained by the court, and the said immaterial, irrelevant, and prejudicial matter be stricken from the files and for naught held.

3rd. The defendant denies each and singular the allegations in plaintiff's petition contained, and demands strict proof thereof, and of this it puts itself upon the country.

4th. For further answer herein, defendant avers that the policies or contracts upon which this suit is based are in writing, and consist of the application signed by the assured and the policies issued thereon, both of which contain certain covenants and warranties which are part of said contract of insurance and the consideration therefor; that among the provisions and conditions in said policies sued upon there is the following in each one of said policies, to wit: "That if any concealment or untrue statement or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso fact-* null and void, and all monies paid hereon shall be forfeited to said association;" that among the statements made by the insured in the said application, and warranted by him to be true, was the following: "That my present occupation is real estate and farming." Defendant avers that the said statement was and is false and untrue; that assured was not at the time of his application a dealer in real estate or a real-estate agent; that he was not and for long time prior thereto had not been, if ever he was, engaged in farming, and that his occupation was at the time and just preceding the making of said application that of an assistant in a photograph gallery; that his prior occupation before the time of his being so employed as such assistant was not that of a book-keeper; all of which defendant stands ready to verify.

Wherefore it says there was a breach of the warranty in each of said policies contained as to the present and prior occupation of the insured; that each of said policies are absolutely null and void, and plaintiff is not entitled to recover thereon.

5th. And, further answering, defendant avers that by the terms of the said policies and each of them, as conditions precedent

21 to their continuance in force and validity, the assured promised and agreed that the stipulated payments in advance to defendant of $32.50, upon the 28th day of the months of October and April in every year for the period of ten years from October 28th, 1896, should be made by him on each policy, and that if any semi-annual premiums were not paid as by said policies were provided, then the said policy should thereby become null and void. Defendant avers that the said semi-annual premiums accruing since the issuance of said policies and each of them have neither nor have any of them been paid; that one semi-annual payment on each of said policies was due on the 28th day of April, 1897, which was not paid, and that by the failure to pay the same the said policies and each of them became null and void.

Wherefore the plaintiff is not entitled to recover herein.

6th. And for further answer defendant avers in any event, and even though the said Hunter be dead, it is not liable for the penalty and attorneys' fees claimed in said petition because it is chartered and authorized to do business in the State of Texas under the assessment and natural premium plan, in accordance with and under the requirements of article 3090, Revised Statutes of Texas of 1895, and was doing business under the same law and on the same plan at the time of the issuance of the policies sued on, and has so continued to do business since then, and that plaintiff is not entitled to recover the penalty and attorneys' fees sued for and prescribed by the statutes of Texas, as claimed in her said amended petition, because it says by the provision of section 1, article 14, of the amendments to the Constitution of the United States it is provided "That no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and that the said act of the legislature of the State of Texas prescribing a penalty and imposing attorneys' fees is contrary to and violative of the Constitution of the United States, section 1, article 14, thereof, as well as other provisions, and is therefore void, and plaintiff is not entitled to recover thereunder; all of which the defendant stands ready to verify.

PERKINS, GILBERT & PERKINS AND
JOHN W. WRAY,
Attorneys for Defendant.

22 The foregoing has the following endorsements, to wit:
#2118. Jennie M. Metler *vs.* Fidelity Mutual Life Ass'n. Defendant's second amended original answer. Filed 28 day of May, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

23 *Amended First Supplemental Petition.*

Filed May 28, 1900.

In the U. S. Circuit Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASS'N. } #2118.

Now comes the plaintiff in the above-entitled cause, and, leave of the court first had, files this her amended first supplemental petition in reply to defendant's first amended original answer, and by way of amendment and reply thereto plaintiff says:

1. Plaintiff denies all and singular the allegations contained in said answers.

2. Further answering, plaintiff says that the defendant is a corporation, duly incorporated under the laws of the State of Pennsylvania, with its principal office and domicile in the city of Philadelphia, said State of Pennsylvania; that the contracts or policies of

insurance sued upon were issued in the city of Philadelphia, State of Pennsylvania, and in obedience to the laws thereof, and that, therefore, the said insurance policies are contracts made under and by virtue of the laws of the said State of Pennsylvania; that under the laws of said State in force at the time of the issuance of said policies it was provided in effect that no statement made in an application for an insurance policy should be considered a warranty unless the same materially affected the risk assumed by the insurance company in the issuance of the policy.

Plaintiff further says that the alleged representation with reference to the occupation of the said William A. Hunter, as stated in defendant's answer, is not shown to have been material or to in anywise affect the risk assumed by the defendant in the issuance of said policies; that the same appears to be utterly immaterial. Wherefore plaintiff says that under the laws of the State of Pennsylvania the alleged statement with reference to the occupation of the assured is immaterial and in nowise affects the validity of said policies of insurance; all of which she stands ready to verify.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

Further answering, plaintiff says, in reply to the fourth subdivision of said answer, that, at the time said policies were issued, defendant's agent who took the application for said insurance
24 and issued said policies had full knowledge of the occupation, present and past, of said William A. Hunter; that defendant and its said agent had notice of the extent and nature of the assured's occupation, the extent of his deal in real estate and farming, and of the extent of his prior occupation of book-keeping; that at the time defendant issued said policies and subsequent thereto, up until the institution of this suit, the defendant was fully advised with reference to the past and present occupation of the deceased; that with such knowledge the defendant accepted the payment of premiums on said policies, and thereby waived any objection it might have urged thereto because of the deceased's said occupation.

Plaintiff further says that the defendant has never sought to have said policies cancelled because of any warranties contained therein or of the warranty set up in said answer as being untrue; has never tendered back to the deceased or any representative of his the moneys paid on said policies, nor done any other act or thing, or made any contention that said policies were void or voidable because of any such alleged breach of warranty; that after the death of said assured defendant, bein- in full possession of all the facts, never sought to avoid or cancel said policies because of any such alleged breach of warranty, and never made any such contention until after the institution of this suit, but always treated said policies as a subsisting demand until the alleged death of said insured.

Wherefore plaintiff says that if there was any breach of said warranties, as alleged, which is not admitted but denied, that the same has been fully waived by the defendant, and defendant is now and

should be estopped from asserting any such breach of warranty; all of which plaintiff stands ready to verify.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff.

The foregoing has the following endorsements, to wit:
No. 2118. Jennie M. Mettler *vs.* The Fidelity Mutual Life Ass'n. Plaintiff's amended first supplemental petition. Filed 28 day of May, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

25 *Defendant's Supplemental Answer.*

Filed May 28, 1900.

In the United States Court for the Northern District of Texas, at Dallas.

JENNIE M. METLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } # 2118.

Now comes the defendant, leave of the court, and files this its first supplemental answer in response to plaintiff's first supplemental petition, filed February 2nd, 1900, and, answering the same:

1st. It demurs to all that portion of the said pleading following the general denial, and says the same is insufficient in law and constitutes no matter of defense to the defendant's second amended original answer, and of this it prays the judgment of the court.

PERKINS, GILBERT & PERKINS AND
JOHN W. WRAY, *Attorneys for Defendant.*

2nd. Further answering, it denies each and singular the allegations therein, and of this it puts itself upon the country.

PERKINS, GILBERT & PERKINS AND
JOHN W. WRAY, *Attorneys for Defendant.*

3rd. Further answering, defendant avers that the contracts or policies of insurance were made in Texas; that they were delivered in Texas to the assured, who was then a resident of Texas, and the semi-annual premium was paid in Texas; that they were payable in Texas in event of the condition happening which would create a liability to pay, and were and are wholly governed, controlled, interpreted, and to be construed by the laws of Texas regulating, interpreting, and construing contracts of like character; all of which it stands ready to verify.

PERKINS, GILBERT & PERKINS AND
JOHN W. WRAY, *Attorneys for Defendant.*

The foregoing has the following endorsements, to wit:
2118. Jennie M. Metler *vs.* Fidelity Mutual Life Association. Defendant's supplemental answer. Filed 28 day of May, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

26 *Final Judgment.*

July 4th, 1900.

JENNIE M. METTLER
v.
FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118. July 4th, 1900.

On May 28th, 1900, this cause was regularly called for trial, and came the parties plaintiff and defendant, by their respective attorneys, and announced ready for trial; then came on to be heard by the court the general and special exceptions of the defendant in its second amended original answer to the first amended original petition of the plaintiff, which exceptions, general and special, upon consideration thereof, are by the court overruled, except the special exceptions marked *c*, *d*, *e*, and *f*, which are by the court sustained, defendant having admitted in open court the sufficiency of the preliminary proofs of death and claim referred to in paragraphs five, six, seven, and eight of said petition; to which ruling of the court the plaintiff and defendant then and there excepted, and then came on to be heard by the court the demurrer of the defendant in its supplemental answer to all that portion of plaintiff's first supplemental petition following the general denial, which, upon consideration, the court overruled; to which ruling the defendant excepted, and then came a jury of twelve good and lawful men, to wit:

R. A. Ware,	Geo. Newsome,	J. J. Hardiman,	C. E. Hunt,
W. R. Hudson,	S. G. Sheppard,	J. F. Knox,	T. L. Bradford,
V. B. Curtis,	W. P. Green,	B. R. Parks, and	E. M. Kahn,

who were duly and legally elected, empannelled, and sworn to try this cause, and who, having heard the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on June 2nd, 1900, returned into open court the following verdict, to wit:

"DALLAS, TEXAS, *June 2nd*, 1900.

We, the jury, find for the plaintiff and assess her damages as follows: $15,000 as principal; $2,250.00 as interest at rate 6% from Dec. 2nd, 1897, to June 2nd, 1900; $5,175.00, the same being 12% damages on the amount of $15,000.00 and interest thereon at 6%; $2,500.00 as reasonable attorneys' fees.

E. M. KAHN, *Foreman.*"

27 And the plaintiff, Jennie M. Mettler, having, after the return of the verdict, aforesaid, duly remitted, during the term, in open court, on, to wit, July 4th, 1900, the sum of three thousand and three hundred and seventy-five ($3,375.00) dollars of said five thousand one hundred and seventy-five ($5,175.00) dollars damages, leaving $1,800.00 on the item of 12% damages on the amount of the loss, which remittitur is here allowed, it is, therefore, considered by the court, and it is so ordered, adjudged, and decreed,

that the plaintiff, Jennie M. Mettler, do have and recover of and from the defendant, The Fidelity Mutual Life Association of Philadelphia, the sum of twenty-one thousand five hundred and fifty ($21,550.00) dollars, with interest thereon from the date of this judgment at the rate of six (6%) per centum, together with all costs herein incurred and expended, for which execution may issue.

It is further ordered by the court that the officers of court and all persons to whom costs are due do have and recover of and from said plaintiff and defendant the costs by each of them respectively incurred, for which execution may also issue.

28 *Motion for New Trial.*

Filed June 4, 1900.

In the United States Circuit Court for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118.

The defendant moves the court to set aside the verdict herein rendered and grant it a new trial for the following reasons, to wit:

1.

Because the court erred in overruling defendant's special exception to that part of plaintiff's first amended original petition claiming attorneys' fees and statutory penalty.

2.

Because the court erred in admitting the evidence of W. A. Hunter, Sr., Clara Hunter, Charles E. Hunter, and other members of the Hunter family and relatives, tending to establish the family repute concerning the death of William A. Hunter, Jr., the alleged deceased, as shown by bill of exceptions No. —.

3.

The court erred in allowing F. M. Etheridge to testify concerning the value of attorneys' services, and in instructing the jury in his general charge that if they found for the plaintiff to find 12 % damages on the amount of the policy and interest thereon, together with all reasonable attorneys' fees incurred in the prosecution and collection of her claim, because the same is contrary to section 1, art. 14, of the amendments of the Constitution of the United States and to the constitution and statute of the State of Texas.

4.

The court erred in that portion of his general charge as follows, to wit:

"The evidence of witnesses is also before you tending to show that

William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896.

You should carefully consider this evidence in relation to
29 his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

Because it required the jury to believe from the evidence that both witnesses had seen the absentee, when proof that either had seen him was sufficient to defeat recovery herein.

5.

Because the court erred in refusing to give special charge No. 1, asked by defendant.

6.

Because the court erred in refusing to give special charge No. 2, asked by defendant.

7.

Because the court erred in refusing to give special charge No. 3, asked by defendant, and in failing to submit the question of whether the assured, W. A. Hunter, Jr., was a real-estate agent and farmer as a question of fact to the jury, and in assuming in his general charge that such fact was beyond dispute.

8.

Because the court erred in refusing to give special charge No. 4, asked by defendant.

9.

Because the court erred in refusing to give special charge No. 5, asked by defendant.

10.

Because the court erred in refusing to give special charge *No.* 6, asked by defendant, and in failing to apply the doctrine of "specific peril" in any manner to the facts of this case or to give any charge thereupon.

11.

Because the verdict is contrary to the law.

12.

Because the verdict is contrary to and without the support of the evidence.

30 13.

Because the verdict is excessive.

Respectfully submitted.

JNO. W. WRAY,
PERKINS, GILBERT & PERKINS,
Att'ys for Defendant.

The foregoing has the following endorsements, to wit:

No. 2118. Jennie M. Mettler *v.* The Fidelity Mutual Life Association. Motion for new trial. Filed 4 day of June, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Jno. W. Wray, Perkins, Gilbert & Perkins.

31 *Defendant's Amended Motion for New Trial.*

Filed June 25, 1900.

In the United States Circuit Court, Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } # 2118.

Now comes the defendant and amends its motion for new trial heretofore made herein, and moves the court to set aside the verdict of the jury and the judgment thereon rendered and grant it a new trial for the following reasons, to wit:

1st. The court erred in overruling the defendant's special exception to that part of plaintiff's first amended original petition claiming attorneys' fees and statutory penalty.

2nd. The court erred in admitting the evidence of plaintiff, W. A. Hunter, Senior, Clara Hunter, Chas. E. Hunter, and the remaining members of the Hunter family and relatives, wherein they undertook to establish by general reputation in the family the death of the assured, as shown by bill of exceptions No. —.

3rd. The court erred in allowing F. M. Eatherage to testify concerning the value of attorneys' services because:

1st. This is a mutual association.

2nd. Because there is no warrant or authority of law to allow in any event the recovery of attorneys' fees.

4th. The court erred in refusing to permit the defendant to establish by the witnesses who were present with the plaintiff in the rescuing party at the supposed scene of Hunter's death that after having made the full investigation of every fact and circumstance connected therewith and his disappearance they were of the opinion derived from such facts and circumstances that the said Hunter did not meet his death by drowning in the Pecos river, as shown by bill of exceptions No. —.

This error is the more apparent in view of the fact that the testimony of the plaintiff on the trial was that, from the facts and circumstances she then gleaned, she wrote to her father that the assured was dead; that he met his death by drowning in the Pecos river, and from this circumstance and this letter alone, connected with the fact that the assured had not been heard of by the family, did
32 the truth of family repute as to his death solely arise. If it was admissible at all upon the part of the plaintiff that she could start the growth of this element of general repute in the

Hunter family, which was then distant from the supposed scene of the assured's death some 2,000 miles, it was certainly the duty of the court to have submitted to the jury the evidence of the other members of the rescuing party whose minds were unaffected by sorrow, uninfluenced by selfish emotions, and who could the more readily have rendered an unbiased opinion in the premises.

6th. The court erred in refusing to admit proof on the part of the defendant of the general reputation in the community in which the assured disappeared as to whether he was alive or dead, the defendant being able to establish by over ten reputable citizens of said community which were then present that there was not a dissenting voice in the community as to Hunter's being alive or dead, and that it was the universal opinion that he was alive, as shown by bill of exceptions No. —.

7th. The court erred in that portion of his charge, which was duly excepted to by the defendant, wherein he uses the following language:

"If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3rd, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict," etc., etc.

In another paragraph of the charge the court says:

"Absence alone cannot establish the death of Hunter, for the law presumes as individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

These three references so prominently directed by the charge to the attention of the jury must necessarily have impressed them with the fact that the continued disappearance of Hunter was a matter of profound moment in establishing his death, and the reiteration of this matter of disappearance so often in the charge of the court was calculated to give undue prominence in the consideration by the jury to the facts introduced by the plaintiff tending to establish Hunter's death.

8th. The court also erred in grouping and calling attention
33 to the jury the facts upon which death was supposed to rest upon the part of the plaintiff, and in failing to group any of the facts or call attention of the jury to any of the facts relied upon by the defendant to establish the negative of the proposition, save and except the testimony relating to the assured's being seen since his disappearance.

9th. The court erred in refusing to give special charge Nos. 1, 2, 3, 4, 5, and 6 requested by the defendant, each of which are made parts hereof as though especially set out.

10th. Especially did the court err in failing to submit to the jury in special charge No. 3 the question of whether or not the assured

was a real-estate agent or farmer, and assuming by the general charge that these facts were beyond dispute.

11th. Especially did the court err in refusing to give charge No. 6 asked by the defendant, which undertook to apply to the case the doctrine of specific peril. This should have been given, or one embodying the same idea should have been submitted by the court.

12th. The verdict is contrary to the law and is wholly unsupported by the testimony in that there is no evidence establishing or tending to establish in any legitimate manner the death of the assured. That utmost that can be said from the testimony is that it has established a case of disappearance solely and only; and because the overwhelming and preponderating facts that are unimpeached and unimpeachable in the record have established that the assured did not meet his death by drowning, as alleged.

13th. The verdict and the judgment are excessive as to the allowance of attorneys' fees and as to the allowance of 12% damages, as to allowance of interest, & in its totality.

14th. The defendant especially and respectfully submits to the court that a new trial should be granted it if all the above and foregoing matters should be resolved against it and it should be deemed by the court that none of them are well taken, for the reason that on the trial of the case the defendant was surprised, ambushed, & ensnared by the testimony, acts, and conduct of the witness Slack, as will appear by the affidavits hereto attached and made a part of this ground for a new trial.

34 15th. Defendant further especially submits that a new trial should be granted it on account of what it believes was a matter of most doubtful propriety upon the part of a juror during the trial of the case, as will appear by an affidavit hereto attached and made a part hereof. Defendant submits that it was, to put it most mildly, a matter of extreme indelicacy and impropriety that pending the trial of this important case the chief witness and one who seemed to be deeply interested in the plaintiff's recovery should spend a social hour with a leading juror.

Defendant respectfully submits that for the foregoing reasons a new trial should be awarded it.

GILBERT, PERKINS & GILBERT AND
JOHN W. WRAY, *Attorneys for Defendant.*

STATE OF TEXAS, }
County of Tarrant. }

Personally came before me, the undersigned authority, John W. Wray, who on oath says that he has been connected with the case of Metler against the insurance company for a considerable period of time as counsel, and that in order to familiarize himself with the facts surrounding the supposed disappearance of the insured, Hunter, on or about the 21st day of May, 1900, he went to Pecos with R. C. Milliken; from there to the scene of Hunter's camp, on the Pecos river, in company with the said Milliken, R. S. Johnson, —— Randolph, and Henry Slack; that they went up on the west side of the

river, while the camp and the supposed scene of the accident resulting in Hunter's death was on the east side of the river.

After arriving at the river opposite the camp affiant and Henry Slack forded the river with the avowed purpose of the said Slack taking the said Wray to the exact place where the footprints were made on the bank of the stream and where the limb or root was broken; that the stream was forded, and the said Slack took the said Wray to the supposed place, pulled up a little stick to which was attached a rag apparently a little sanded by rain, and said, "This is the exact point where the limb or root was broken." He
35 then put his feet supposedly in the exact position with reference to the bank of the stream that the tracks were found. He moved away, and affiant then, under the directions of the said Slack, put his feet in the supposed identical position that the tracks were found. Affiant then reached down as though he were to pull the supposed limb or root, as it was believed the said Hunter pulled, and was directed by the said Slack to pull back substantially, if not exactly, in the same way that was exhibited by the witness Johnson on the trial before the court and jury, and explained further to affiant about the shivering of the root or limb, or the splintering of it, which, as he said to affiant, conclusively showed that the person breaking the root or limb broke it away from the stream and not toward the stream.

He further showed affiant where the limb or root was dug out of the ground, and in place of it being dug toward the bank, as the said Slack testified on the trial of the said case, he showed affiant that it was dug away from the bank substantially as testified to by the said R. S. Johnson, and showed affiant the exact point at which the digging had been accomplished. At the same time he got down over the bank immediately west and in front of the supposed broken root or limb and stood on the margin of the sand beneath, which was then two and one-half to three feet wide, and undertook to demonstrate from that position he then stood in, affiant standing in the supposed footsteps of the said Hunter, that it would be impossible for the said Hunter to land in the said water without making some indications on the bank of the river or the sand that was between the bank and the margin of the water at the time that he, the said Slack, first made efforts to discover the camp and whereabouts of the said Hunter.

He further went on to show, which from the appearance of the bank seemed to be absolutely true, that there had been no change whatever in the bank between the time that he first discovered it and the time we were making the examination, save and except a little bit of the margin at the top had been shoveled off with a spade.

The said Slack further pointed out the identical spot at which the wagon was supposed to stand, the place where the horse was supposed to die, showed affiant his bones, or supposed bones, the twig or limb to which he was tied, and stepped out of the supposed foot-
prints of Hunter to the salt grass adjoining, and walked away
36 on the tufts of the salt grass 100 to 150 feet, undertaking thereby to demonstrate conclusively to the mind of affiant

that the said Hunter could have readily, if he desired, stepped out of the footprints on to the tufts of salt grass and walked away without leaving any impress or marks of his departure from the footprints.

Affiant says that he and witness were alone in these explanations by the witness; that the remainder of the party were on the opposite side of the river taking some observations, making some measurements, etc.; that they did go across because the river was then up and was rising and there was danger of getting wet by fording it; that affiant went over the bank with the said Slack and was shown all the configurations of the bank, the character of the soil at the bottom of it, was shown where the peninsula had been located, where the water was supposed to be dipped, and went into all of the details with apparent exactitude and with the supposed intention on his part and with the intention and belief by affiant to give to affiant accurate, truthful, and correct information of every detail in connection with the disappearance of the said Hunter; that the said Slack seemed to have an excellent recollection of circumstances and details and seemed to know the exact geographical position of every item connected with the camp and the disappearance of the assured; that he knew that affiant had proceeded to the point with the purpose of acquiring all the accurate information that was possible and was endeavoring by every means in his power to be put into possession of such information; that affiant believed the statements and representations of the said Slack and relied upon them as truthful, and the information by him so gleaned appeared to be the more truthful, as it corresponded, as near as human testimony can reasonably correspond, with the testimony of R. S. Johnson, with whom affiant had previously talked in relation to the said matter.

Affiant further says that the said Slack, in his opinion, was a material witness, and he told Milliken, the defendant's agent, that Slack must be present to testify to the facts disclosed by him to affiant; that affiant placed him on the witness stand in absolute confidence and reliance upon the above matters and things and expected and believed that the said Slack would testify as above indicated; that,

37 upon the contrary, the said Slack testified, as the court will remember, that in place of the appearance of the root or limb having been broken back from the bank that it was broken toward the bank, and that the root or limb projected up east from the bank and was imbedded toward the bank in place of projecting west and being imbedded in the ground east of the bank. In other words, the testimony of the said witness was exactly the reverse of what he represented the truth to be upon the ground; that he also testified differently as to the configuration of the bank, the depth of the bank, etc., from what he had told affiant; all of the latter of which will appear from the stenographic notes of the testimony of said witness.

Affiant further says that on the examination of the said witness he was of opinion that he had simply erred in his recollection or had become confused and was endeavoring to tell the truth in relation to the matter, but had gotten it misplaced in his mind, and that

when the said witness undertook to illustrate the positions to the jury, just as he was about to go off the stand, and did illustrate them, affiant was surprised and greatly perturbed by the said testimony; that it was about the noon hour, and court immediately adjourned; that affiant and his associate counsel immediately held a consultation, the said Milliken being present, and affiant repeated to his associate counsel substantially the above facts set out as to what the said Slack had told him and showed him, and said he believed the said Slack was simply mistaken; that he was something of an ignorant man, and that the testimony was a great surprise, and they, he and his associate, should see the said Slack before anybody had approached him in regard to his testimony and explain to him the way he had testified and ask if he wished that he might correct his testimony.

This was agreed upon between affiant and his associate, and they proceeded at once to the hotel and found the said Slack and explained to him his testimony, and that they believed that he was mistaken and said they desired that he should have an opportunity to correct it if he wished; that Slack at once showed considerable feeling and remarked, "It was just exactly as I told it, and if you want to do anything about it, just hop on." We explained to him that if he remembered it exactly as he testified, then there was nothing to be done; that it was simply our purpose to have the
38 truth, and that we thought that he was mistaken and meant to give him an opportunity to correct himself. He again replied that he knew all along that we thought that his testimony was the other way, but undertook to make no further explanation. Affiant simply said to him, "You ought not to have deceived me; you ought to have told me how you understood it. I simply wanted the facts from you and the truth. I have no feeling about the testimony, but only feel that you have deceived me in regard to what you showed me out on the ground, and in regard to what you have told me since in conversing with you," and thereupon affiant and his associate left the said Slack.

Affiant further says that the said Slack either purposely or ignorantly deceived affiant in the important matters above set out; that his deceit must have been purposely accomplished by the statement made to affiant and his associate, above set out, substantially, that he knew all along that we thought the matter was different from what he testified to.

Affiant says that there can be no possible doubt of the said Slack going through the marking of the footprints, etc., above set out and testified to herein; that defendant was played false by the said witness, either purposely or ignorantly, and affiant cannot doubt but that it was purposely accomplished.

JOHN W. WRAY.

Sworn to and subscribed before me this 14th day of June, 1900.

[SEAL.] MORGAN BRYAN,
N. P., Tarrant Co., Tex.

STATE OF TEXAS, }
County of ——, }

Personally appeared before me, the undersigned authority, J. E. Gilbert, who on oath says that he has read that portion of the affidavit of his associate counsel, John W. Wray, relating to their conversation with the witness Slack and relating to what occurred between him and his associate and the said Milliken in relation to that matter, and the same is substantially true as therein set out.

J. E. GILBERT.

Sworn to and subscribed before me this 25th day of June, 1900.

[SEAL.] EDWARD G. PERKINS,
Notary Public, Dallas Co., Texas.

39 STATE OF TEXAS, }
County of Dallas. }

Personally came before me, the undersigned authority, R. C. Milliken, who on oath says:

That he knows that during the trial of the foregoing case J. B. Gibson, a witness for the plaintiff, on or about the evening of the 31st of May, was at the residence of the juror B. R. Parks and took supper with him and spent the evening at his residence.

That the said Gibson was the plaintiff's chief witness, took a deep interest in the prosecution of her cause, exhibited on several occasions a great deal of feeling about the case in the presence of affiant and other persons, and manifested every intention and desire to accomplish everything possible for the plaintiff's success.

R. C. MILLIKEN.

Sworn to and subscribed before me this June 25th, 1900.

EDWARD G. PERKINS,
[SEAL.] *Notary Public, Dallas Co., Texas.*

The foregoing has the following endorsements, to wit:

#2118. Jennie M. Metler *vs.* Fidelity Mutual Life Association. Defendant's amended motion for new trial. Filed 25 day of June, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

40 *Order Extending Time to File Bill of Exceptions.*

June 6, 1900.

JENNIE M. METTLER
vs. } 2118.
FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA.

JUNE 6, 1900.

On motion therefor, it is ordered by the court that the defendant herein be, and it is hereby, allowed up to and inclusive of July 6, 1900, within which time to prepare, submit, and file its bill of exceptions in this cause.

Order on Motions of Defendant for New Trial, etc.

June 25, 1900.

JENNIE M. METTLER
v.
FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. } 2118.

JUNE 25, 1900.

On this day came on to be heard the motions of the defendant for a new trial in this cause, and the court, having heard and considered said motions, is of the opinion that said motions are not well taken, and it is ordered and adjudged they be, and they are hereby, overruled and a new trial refused in this cause.

Upon motion of the defendant, it is ordered by the court that the defendant herein be, and it is hereby, allowed up to and inclusive of September 25, 1900, within which time to prepare, submit, and file its bill of exceptions herein, and the time for filing said bill of exceptions is hereby extended up to and inclusive of said date.

41 *Plaintiff's Remittitur.*

Filed July 4, 1900.

In U. S. Circuit Court at Dallas, Texas.

JENNIE M. METTLER
vs.
FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118.

Now comes the plaintiff, Jennie M. Mettler, by her attorneys, and shows to the court that in calculating the 12 per cent. statutory damages allowed her on the amount of the loss herein the jury calculated 12 per cent. for two years and a half thereon—that is, from December 2nd, 1897, to June 2nd, 1900—allowing on said item $5,175.00, and to cure the apparent error said plaintiff files this her remittitur, with leave of the court first had and obtained, remitting $3,375.00, making said item $1,800.00 instead of $5,175.00. Wherefore plaintiff prays judgment on the verdict, less the amount here remitted, and for general relief.

ALEXANDER, CLARK & THOMPSON,
STANLEY, SPOONTS & THOMPSON,
Attorneys for Plaintiff, Jennie M. Mettler.

Notice of above motion is accepted, all other objections reserved.

PERKINS, GILBERT & PERKINS,
Att'ys for Defendant.

The foregoing has the following endorsements, to wit:

In U. S. circuit court at Dallas, Texas. No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Plaintiff's remittitur. Filed 4 day of July, 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

42 *Assignments of Error.*

Filed Aug. 24, 1900.

Assignment of Errors.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

JENNIE M. METTLER
vs.
THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. } No. 2118.

Now comes the defendant, The Fidelity Mutual Life Association of Philadelphia, and says there is manifest error in the trial and record of this cause, and by its attorney files in this behalf the following assignments of error, to wit:

1. The court erred in overruling defendant's special exception to the 9th paragraph or count of plaintiff's first amended original petition, filed herein on November 11th, 1899, wherein plaintiff claims that by reason of defendant's failure to pay her alleged loss, it became liable to her for 12% penalty and 15% attorneys' fees under the statute of Texas, which is as follows:

Art. 3071, Revised Statutes of Texas, 1895:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss;" which special exception is as follows, to wit:

"Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorneys' fees and statutory damages in this action, because such attorneys' fees and damages are asserted and claimed under a statute of the State of Texas, which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said Constitution, and provisions of the constitution of the State of Texas, and therefore void;" because said statute is contrary to and in violation of section 1, article 14, of the Constitution of the United States, and would deprive plaintiff in error of its property without due process of law and deny it the equal protection of the law, and

for the same reason the court erred in permitting the witness
43 F. M. Etheridge, an attorney-at—, to testify as an expert, over objection by plaintiff in error, in behalf of plaintiff as follows: "That a reasonable attorneys' fee would be $2,500.00." In answer to the question by plaintiff's counsel, stating the amount in controversy, and the questions involved and labor performed, and for the further reason that the defendant is a mutual association

and doing business in Texas under the assessment or natural premium plan and not amenable to the said statute of Texas, and that under the statute of Texas, under which defendant does business, no penalty and transfers are provided, which statute is found in article 3090, Revised Statutes of Texas, 1895, and for the same reasons the court erred in his general charge to the jury as follows:

"If under the foregoing charge you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with 6% interest thereon from December 2nd, 1897, which is the date on which this suit was instituted in the State court, down to this date, June 2nd, 1900, and also 12% on the total of the face of the policies and interest as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss, and your verdict should separate the amounts found as principal, as interest, and damages, and the amount found as reasonable attorneys' fees," and in refusing to give special instruction No. 4, requested by defendant, as follows:

"Plaintiff is not entitled to recover attorneys' fees or penalty even if you should, under other instructions given, find that plaintiff is entitled to recover on the policies."

2. The court erred in permitting plaintiff, over defendant's objection, to testify herself, and to introduce the testimony of her father and brothers and sisters to the same effect, that the reputation in the family was that the insured was dead, and that he had drowned in the Pecos river, and that the family belief had existed ever since the plaintiff had written the family about the disappearance of insured; because it is not competent to establish the death of one who has disappeared in less than seven years by reputation in the family, and because it is hearsay, at least on the part of the members of the family other than plaintiff, none of whom was resident
44 in the locality of the alleged disappearance, but more than a thousand miles distant therefrom, and had never been in Texas, and because no member of the family, other than plaintiff, had any information or knowledge concerning this matter other than what had been communicated to them by plaintiff while they were in Ohio, and because it further appears from the record that the declarations and testimony offered and introduced all come from members of the family who are still living.

3. The court erred in refusing to permit defendant to prove by Lee Johnson, Patrick Carson, and a number of other witnesses, some of whom were of the searching party that first discovered the camp outfit of the insured, the general reputation in that locality, namely, Pecos, Texas, and vicinity, as to whether or not Hunter was dead. Defendant could have proven by said witnesses that it was the universal opinion in that locality that Hunter is alive; that the said witnesses were not interested in the result of this case and had made investigation of the facts and circumstances surrounding the disappearance, and in the locality thereof, because from the same facts obtained in the same locality plaintiff had formed her conclusion as to the cause of the disappearance of her brother, and had written

the letter to her family in Ohio creating the family repute concerning his alleged death, testified to by herself and her father, brothers, and sisters, and because, if reputation be at all admissible concerning the life or death of one absent less than seven years, the general reputation in the community from which he disappeared, and where he is alleged to have lived for a number of years, is admissible rather than family repute existing in the family, resident 1,500 or 2,000 miles from where the insured disappeared, and based upon the same facts upon which the general public in the community from which insured disappeared founds its opinion concerning the said disappearance.

4. The court erred in permitting the witness J. B. Gibson to testify to the alleged conversation between himself and defendant's witness Randolph concerning the distance between the Pioneer Canal Company's dam across the Pecos river and the place where insured's camp was found. The witness Randolph had testified to the distance on a straight line and along the meanderings of the river, and the court permitted the witness Gibson to testify that Randolph
45 made a contrary statement to him as to his (Randolph's) measurements and said distance, because such action was permitting the impeachment of the witness Randolph by proving alleged and contradictory statement made in conversation with the witness Gibson on an immaterial matter, and it was calculated to prejudice the jury against defendant's witness and was to defendant's damage.

5. The court erred in those paragraphs of his general charge as follows, to wit:

"If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3rd, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict."

In another paragraph of his general charge was the following language:

"Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

Because such repeated references so prominently directed the jury's attention to the question of assured's continued absence as must have necessarily unduly impressed them with the belief that continued absence alone was of paramount moment in establishing his death, and that such was the court's opinion, and it was calculated to cause the jury to give undue weight to plaintiff's evidence touching such disappearance and the family repute concerning his death.

6. Because the court erred in refusing to give special instruction No. 3, requested by defendant, which is as follows, to wit:

"A warranty is a stipulation in writing in a policy or a condition thereon endorsed, on the truth or fulfillment of which the entire

contract depends. Such stipulation may be on the face, margin, or back of the policy, and whether it be material to the risk is not a question for the jury to consider. Therefore the jury must believe
46 from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued and are herein involved, was at the time he made such application both a farmer and real-estate agent, and unless you so believe you will find for defendant."

And in wholly ignoring to give in his general charge any instruction whatever on the question of warranty, set up in the pleadings by defendant, as to the occupation of assured, because insured had in his application warranted that he was by occupation a farmer and real-estate agent, whereas the proof showed he was without occupation and without a settled habitation or residence, and because the State had forfeited long prior to his disappearance the entry made on the public domain by insured for failure to pay the first instalment of interest on the purchase price (an insignificant payment only on the principal having been made and no interest thereafter paid thereon), and because the alleged place to which plaintiff testified insured started was in a county which did not contain a single inhabitant, was disorganized, and in which there never had been a farm, and where the irrigation scheme entered into several years prior had been wholly abandoned and had never been put in operation, and because the court ignored the question of fact presented by the pleading, the testimony, and this special charge, and assumed that the answers of insured in his application were true in the face of the record, and thereby invaded the province of the jury in refusing to submit to them the question of fact, and because, by the express terms of the contract between defendant and assured, it is expressly stipulated that the statements made in his application and signed by assured are warranted to be true and material to the risk, and that if any concealment or untrue statement or answer be made or contained therein, then the policy issued thereon should be *ipso facto* null and void, and all moneys paid thereon forfeited; that this application should be the sole basis of the contract; that no verbal statement should affect the contract, and no agent had authority to make or alter contracts, waive forfeitures, or grant credit.

7. The court erred in refusing to give special charge No. 2, asked by defendant, as follows:

"If you believe from the evidence that Wm. A. Hunter, Jr., has been seen or heard from by any one, at any time since his
47 disappearance, you will find for the defendant."

Because under the court's general charge defendant was not entitled to a verdict unless the insured had been seen after his disappearance by both the witnesses, D. G. Wallace and John B. Littler. The court's general charge on this point was as follows:

"The evidence of witnesses is also before you tending to show that Wm. A. Hunter has been seen on two occasions and at two places since the date of his alleged interference on December 4th, 1896. You should carefully consider this evidence in relation to his having

been — since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant," whereas defendant was entitled to the requested instruction and to a verdict if the jury believed insured had been so seen by either one of said witnesses, and they were not permitted so to do or to consider the testimony of the witnesses separately.

8. The court erred in refusing to give special charge No. 5, asked by defendant, as follows:

"The fact that it is possible or probable that an absent party was at a time and places subsequent to and different from that at which he was last seen in a place where an accident might have befallen him will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death. Therefore unless the jury believe from the evidence that W. A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant."

Because when last seen and when at the place where the broken limb was, if he was ever there, even if all the testimony of plaintiff be taken as true and uncontradicted, insured was not in a position of peril or danger from which it was as probable that he would there lose his life as that he would walk off from such position or place with the same ease as he went there, and because the court had wholly ignored this phase of the case in his general charge.

9. The court erred in refusing to give special charge No. 6, requested by defendant, as follows:

48 "The law presumes that the life of any person continues for seven years after the last time he was seen alive or heard from. The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue—that is, the death of the party. Unless, therefore, the plaintiff has established the death of Wm. A. Hunter, Jr., by the certainty hereinbefore set forth, the jury should find for the defendant."

Because the doctrine of specific peril was not alluded to in the court's general charge, and this special instruction undertook to apply that doctrine to the facts of this case, and, if not a correct and accurate statement of the law, was sufficient to direct the court's attention to his error and should have been given, or one in its stead, on the point requested.

10. The court erred in refusing special charge No. 1, asked by defendant, as follows:

"You are instructed to find for defendant because the verdict is unsupported and unwarranted by the testimony in that there is

no evidence establishing or tending to establish in a legitimate manner the death of the insured, and because the most that can legally be claimed from the testimony is that it establishes a case of disappearance, and that only, and because the overwhelmingly and preponderating facts, unimpeached in the record, have established that the assured did not meet his death at the time and place and in the manner alleged by plaintiff, and that he is not now dead."

JNO. W. WRAY,
PERKINS, GILBERT & PERKINS,
Att'ys for Defendant, The Fidelity Mutual Life Association of Phila.

The foregoing has the following endorsements, to wit:

No. 2118. Jennie M. Mettler *v.* The Fidelity Mutual Life Association of Philadelphia. Assignment of error. Filed 24 day of Aug., 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

49 *Bill of Exceptions.*

Filed Sept. 1, 1900.

In the Circuit Court of the United States for the Northern District of Texas, at Dallas, Summer Term, A. D. 1900.

JENNIE M. METTLER
versus
THE FIDELITY MUTUAL LIFE ASSOCIATION. } No. 2118.

Be it remembered that at the May term of the United States circuit court for the northern district of Texas, held at Dallas, in the court-room thereof, there was present and presiding the Hon. Edward R. Meek, district judge, on the 28th, 29th, and 30th days of May, and the 1st and 2nd days of June, 1900, and the following proceedings were had in the case of Jennie M. Mettler *vs.* The Fidelity Mutual Life Association:

Defendant presented exceptions to the 9th count of plaintiff's first amended original petition, filed in said cause on the 11th day of November, 1899; which count is as follows, to wit:

"Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest, and damages due plaintiff by defendant, on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon defendant for failing to pay the loss within the time specified in the policies was first enacted by the legislature of Texas on May 3rd, 1874; it was carried into the Revised Statutes of 1879; and again

into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be valid. Plaintiff shows that the policies sued on were issued October 31st, 1896, after said statute of 1895 went into effect; that the defendant, as a foreign corporation, was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed and was, when it issued said policies, obligated to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas, whereby it became bound and is liable to plaintiff for said twelve per cent. damages and reasonable attorneys' fees. Plaintiff shows that it appeared to the legislative mind of the State of Texas that the life-insurance business, as conducted and carried on in the State by such corporations, was detrimental to the welfare of its people, and, as the State had a right to do by the exercise of its police power, it prescribed said provisions of the law of 1895, as a part of defendant's contract herein, whereby defendant became bound and liable to plaintiff for said twelve per cent. damages and attorneys' fees."

The demurrer and exception of defendant to said 9th count are contained in defendant's second amended original answer, filed in said cause on the 28th day of May, 1900, and is as follows:

"Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorneys' fees and statutory damages in this action, because such attorneys' fees and damages are asserted and claimed under a statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said Constitution and provisions of the constitution of the State of Texas, and therefore void."

The court then and there overruled said exceptions; to which defendant then and there, to wit, on the 28th day of May, 1900, excepted.

Whereupon both parties announced ready for trial, and the plaintiff, to sustain her issues, offered the following evidence, and the further proceedings were thereupon had:

Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs—are sufficient, and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition, and
51 whether he died in the manner and form as alleged therein.

Thereupon the court sustained special exceptions C, D, E, & F of def'd't to plaintiff's amended petition. Plaintiff offered in evidence the three insurance policies sued upon, numbered respectively D-73372, D-73373, and D-73374, for $5,000.00 each. Each of said policies bears the same date, is for the same amount, issued by defendant to the deceased, W. A. Hunter, and is upon the same terms and conditions, and, by agreement, only one of which is copied into this record.

Policy No. D 73372 is as follows:

Number D 73372. Amount, $5,000. Age, 33.

The Fidelity Mutual Life Association of Philadelphia, Penna.

Term Rate—Stipulated Annual Premium.

For expense fund	$20.00
For mortality fund	41.00
For equation fund	2.15
Total	63.15

By this policy of insurance agrees to pay the sum of five thousand dollars upon the surrender of the same properly receipted within ninety days after the acceptance of due and satisfactory proof of the death of William A. Hunter, of Pecos, county of Reeves, State of Texas, (the member insured under this policy) and of claim hereunder to his sister Jennie M. Mettler, or if the member survive the aforesaid beneficiary to his administrators, executors, or assigns, subject to all the requirements, privileges and provisions stated on the following pages, which are conditions precedent and are a material part of this contract as fully as if they were recited at length over the signatures hereto affixed.

This contract is made in consideration of the written application of the above-named insured, which is made a part hereof, a copy of which is hereto attached and the stipulated payment in advance to said association of thirty-two and $\frac{55}{100}$ dollars upon the twenty-eighth day of the months of October and April in every year, for the period of ten years from Oct. 28th, 1896, and thereafter this policy may be continued in force without medical re-examination by the payment of the stipulated
52 premiums endorsed hereon according to the attained age for either term of years or for life.

In witness whereof, The Fidelity Mutual Life Association has, by its president and treasurer signed this contract at its office in Philadelphia, attested by the secretary this thirty-first day of October, 1896.

L. G. FOUSE, *President.*
O. C. BESBYCHELL, *Treasurer.*

Attest:
[SEAL.] W. S. CAMPBELL, *Secretary.*

Examined by—
T. O. M.

Privileges and Provisions Referred to in the Body of This Policy as Conditions Precedent.

First. Application.—The application, copy of which is given on third page of this policy, forms the sole basis of this contract, and it is hereby made the duty of the insured hereunder to review the

copy of said application, and to report promptly to the president of the said association any misstatements, errors, or omissions.

Second. What shall constitute delivery.—The delivery of this policy shall not be actual and binding unless a receipt for the payment in cash, or its equivalent, of the first premium, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment, be delivered with and accompany the policy within sixty days from the date hereof, and during the lifetime and good health of the person on whose life it is issued.

Third. Change of beneficiary and assignment of policy.—With the written approval of the president or vice-president, the beneficiary herein named may be changed upon the written request of the member by the surrender of this policy; and this policy upon written request, with the written consent of the president or vice-president, may be assigned. In either event a fee of $1.00 must accompany such written request.

Fourth. Notice of premium.—The member shall give prompt notice to the treasurer of the association of any change of
53 residence or post-office address. An affidavit by the mailing clerk of the association, showing that a notice of any matter affecting this contract was mailed in the regular course of business to the member, or person designated by the member, to the last address as shown by the books of the association, shall be taken and admitted as evidence, and held to be conclusive proof of due notice to the member, or person designated by the member, of any matter affecting this contract. Notice of each and every payment due, or to become due, hereon is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived.

Fifth. Revival of policy in the event of lapse.—In case of lapse or forfeiture of this policy, it may be revived upon the written approval of the president or vice-president, and medical director, but not otherwise, subject to the rules of the association.

Sixth. Proofs of loss and claim.—In the event of the death of the within-named insured, the claimant shall promptly furnish due and satisfactory proof to the said association at its home office in the city of Philadelphia of the death and of the just and lawful claim both as to the rights and interests of the beneficiary hereunder, as well as to the justness of the claim, upon the blank forms furnished by the said association, which shall include all information required thereby.

Seventh. Limitation for action.—No suit or action hereon shall be maintained unless actually begun within one year from the day of the death of the member, without reference to the time of furnishing the proofs of death. If any suit in law or equity be commenced after such period of one year, the lapse of time shall be a conclusive bar to any recovery hereon, any statute to the contrary notwithstanding.

Eighth. Power of agents.—No agent of the association has any power or authority to make, alter or discharge contracts, waive for-

feitures, or grant credit; and no alteration of the terms of this contract shall be valid and no forfeiture hereunder shall be waived, unless such alteration or waiver be in writing, and be signed by the president of the association, it being understood, that the powers which the president can exercise as herein stated shall not be delegated.

Ninth. Indebtedness.—Any portion of the stipulated premium for the current year of the death of the insured remaining unpaid
54 at time of death, or any indebtedness of the member, or beneficiary, to said association shall be deducted from the amount payable hereunder.

Tenth. Payment of premiums.—Any moneys required to be paid under this policy during the continuance of this contract must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment to him; otherwise this policy shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to the said association, unless otherwise herein provided. A premium other than that stipulated herein will be accepted according to the association's table of rates, and the same will continue this policy in force for such time as may be mentioned in the receipt for such payment, which must be signed as aforesaid.

Eleventh. Incontestability.—If this policy shall have been in continuous force after three years from the date hereof, it shall in the event of the death of the member, or insured, be incontestable for the sum payable hereunder, but in the event of the death of the member within the period of three years, then if any statement contained in the application on which this policy is issued be found untrue in any respect, or if the member shall die by his own hand, whether sane or insane, or at the hands of justice, or through the habitual use of narcotics, or alcoholic or other stimulants, this contract shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to said association.

Twelfth. Military service, travel, and occupation.—Permission is hereby given to the within-named insured to engage in any military or naval service, except in time of war, to travel and reside in any part of the civilized world at all seasons of the year, except south of the tropic of Cancer, and to engage in any and all occupations or employments other than those mentioned in the application, except those classified in the prospectus of the association as being more hazardous or unhealthy. In the event of the insured's engaging in military or naval service in time of war, or traveling south of the tropic of Cancer, or engaging in any occupation classified in the association's prospectus as more hazardous or unhealthy than
55 those mentioned in the application, without first obtaining the written consent of the president, then this policy shall be absolutely void, except as to the moneys paid hereon, which moneys in either of such events shall constitute the sum insured, and the association's liability under this policy.

Thirteenth. Notice of the object and purpose of payments required hereunder.—The payments required hereunder shall be applied to the several purposes specified on the first page of this policy and as hereinafter provided, but the premium payable the first policy year, less the actual mortality cost, and any saving in the contributions to the mortality fund during the next four years shall belong to the expense fund of the association, and any deficiency in the mortality fund, or any taxes and fees levied by public authority, or expense of investigating and defending fraudulent claims, shall be paid or made good out of the equation fund, the main purpose of which is to equalize the increasing mortality cost due to advancing age, and which shall be deemed and regarded as a surplus of the association.

Fourteenth. Safety clause.—The stipulated premium payable hereunder being based on past insurance experience, it is agreed and understood, excluding the first policy year, that the proportion of the undivided equation fund aforesaid to be maintained on behalf of this policy shall equal the present worth of the sum insured, less the present worth of the future stipulated premiums, according to the association's past experience, computed at four per cent. per annum. If a deficiency shall occur in the equation fund, to be determined by the periodical valuations to be made, as required by the association's by-laws, the same shall be made good by the payment by every member of the association of his *pro rata* share of such deficiency within thirty days from the date of notice of same, or with the consent of the directors, the amount thereof, together with interest at the rate of six per cent. per annum, may be charged against the member's policy, and deducted therefrom when it becomes a claim. Provided always, that the accumulated funds of the association, as required by statute, shall at no time be less than the sum of one periodical or stipulated payment by all the members and not less than $100,000.

56 Fifteenth. Surrender value.—This policy being issued at term rates has no surrender value, but in the event of its continuance beyond the first term, the savings from any source during the first or any subsequent term shall be converted into a life-annuity dividend and applied to the reduction of the stipulated premiums payable hereunder. This policy may be exchanged at any time for an elective life or limited advance-payment policy, to be issued without medical re-examination at the attained age.

Sixteenth. No personal liability.—In the event of the lapse, surrender, forfeiture, or termination of this policy, from any cause, all personal liability of the member, or insured, shall *ipso facto*, or by the act itself, cease and terminate.

Seventeenth. Mutual principle.—It is understood, that the said association is purely mutual, that there are no proprietary or stock interests, that the amount named in its policies is conditioned upon the proceeds of payments made or to be made by its members, and that it is not required to maintain a legal reserve, but simply maintains such a reserve or accumulation as is necessary to enable it to carry out its contracts with members in good faith, and that it grants

the insurance on the flexible premium or assessment plan, and is governed in accordance with its by-laws.

Form B.—Term Rate, Edition Oct., 1896, No. 111 (B).

Renewal Term Rates.

Attained age.	10-year term.	15-year term.	20-year term.	Whole life.
31	12.29	12.57	12.93	21.49
32	12.46	12.77	13.16	22.04
33	12.63	12.98	13.40	22.62
34	12.82	13.22	13.67	23.23
35	13.04	13.52	14.02	23.87
36	13.32	13.88	14.42	24.54
37	13.64	14.28	14.86	25.26
38	14.00	14.72	15.36	26.02
39	14.42	15.22	15.94	26.82
40	14.90	15.78	16.60	27.68
41	15.44	16.40	17.34	28.59
42	16.04	17.08	18.16	29.55
43	16.70	17.82	19.06	30.58
44	17.42	18.62	20.04	31.68
45	18.20	19.48	21.10	32.85
46	19.04	20.40	22.38	34.08
57 47	19.94	21.40	23.82	35.39
48	20.90	22.48	25.42	36.77
49	21.94	23.64	27.18	38.23
50	23.06	24.90	29.02	39.78
51	24.28	26.58	31.00	41.42
52	25.64	28.34	32.86	43.15
53	27.16	30.32	34.88	45.00
54	28.84	32.48	37.02	46.95
55	30.70	34.80	39.36	49.03
56	32.76	37.24	41.96	51.23
57	34.98	39.86	44.78	53.57
58	37.46	42.74	47.82	56.07
59	40.08	45.78	51.00	58.72
60	43.02	49.16	54.48	61.56
61	46.02	52.48	57.90	64.57
62	49.26	56.02	61.50	67.78
63	52.74	59.82	65.32	71.20
64	56.52	63.86	69.38	74.84
65	60.56	68.20	73.64	78.72
66	64.94	72.80	78.12	82.84
67	69.62	77.70	82.88	87.24
68	74.62	82.88	87.88	91.91
69	79.98	88.38	93.12	96.89

Renewed Term Rates—Continued.

Attained age.	10-year term.	15-year term.	20-year term.	Whole life.
70	85.76	94.20	98.74	102.20
71	91.90	100.36	104.64	107.87
72	98.46	106.90	110.88	113.91
73	105.48	113.84	117.44	120.36
74	112.94	121.22	124.42	127.25
75	120.90	129.04	131.80	134.61
76	129.40	137.34	139.62	142.49
77	138.48	146.18	147.96	150.94
78	148.18	155.56	156.86	159.98
78	158.60	165.50	166.38	169.69
80	169.74	176.04	176.58	180.10

The above premiums will be diminished by such an annuity dividend as the savings for the preceding term will afford.

The insured may exchange this policy as provided in the 15th section.

Copy of Application upon which Policy No. D 73372 is Issued.

Application.

1st. I hereby apply to the Fidelity Mutual Life Association of Philadelphia, Pa., for a policy of insurance, to be issued in pursuance of this application.

2d. I certify that my full name is William Addison Hunter, that I was born on the 22nd day of June, A. D. 1863, at or near Homer, Ohio.

3d. That I am now in good health, and am free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise, except I have a slight catarrhal affection when I have a bad
58 cold. If ailment of any kind exists at this time, state character or nature of same.

4th. That my present occupation is real estate & farming prior was book-keeping.

If more than one occupation, give all, and be specific.

5th. That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as here stated. Give full particulars as to the nature thereof, date, and duration, whether trivial or otherwise—if rheumatism, state whether muscular, sciatic or inflam-atory. I had a spell of slow fever in the summer of 1886 was sick about 32 days, fully recovered. I also had measles, mumps &c. during boyhood. La grippe in 1888.

6th. That the last physician I consulted or who prescribed for me was Dr. Duringer, of Ft. Worth, Texas, about summer of 1886, for the sickness here stated: Slow fever above stated. Give date. Give nature and duration of illness, and if complete recovery, say so.....

7th. That I have not consulted or been prescribed for by any other physician or medical man during the last ten years..... Give date, nature of illness, and name of every physician for last ten years.....

8th. That I have never made application for insurance on my life to any company, association, or society, upon which application no policy was or has yet been issued to or received by me for the full amount and kind and at the rate applied for, and that no physician has ever given an unfavorable opinion upon my life with reference to life insurance.....

Give name of each company, date of application, kind of policy, and amount applied for.....

9th. That none of my immediate family, parents, brothers or sisters, nor, to the best of my knowledge and belief, grandparents, uncles and aunts, are now afflicted with, or ever had, or died of consumption, lung disease, scrofula, cancer, heart disease, paralysis, suicide, insanity, epilepsy, Bright's disease, diabetes, or any hereditary disease.....

Give relationship, character and duration of illness in every case. Avoid any general terms—be specific.....

10th. That I am not now, and have never been, engaged
59 in the sale or manufacture of wines, spirits or malt liquors, either directly or indirectly.....

Give dates and full particulars.....

11th. That I do not use, and have never used, spirits, wines, malt liquors, or narcotics, and have always been temperate and sober except as stated below: I will not average more then one glass of beer per month. Answer must be specific—"moderately" or "occasionally" will not do. Give kind and daily quantity, and the number of times you have used them, or any of them, to extent of inebriation.....

12th. That I am not now insured in this association, and that the total amount of insurance now on my life is $ none, the kinds of policies, dates, of same, amounts, and respective companies being as follows:..... Give name of each company, amount, kind and date of policy.....

13th. That the money to keep policy in force will be furnished by myself.

14th. That the following are three intimate friends (not relatives) who have known me for the last two years:

Full name.	Occupation.	Residence.
John Stewart.....	Collector for Altman-Miller Implement Co.	Dallas.
D. H. Swarts.....	Photographer.....	Ft. Worth, Texas.
C. F. Thomason.....	Merchant	Pecos City, Texas.

I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, *are* material to the risk, and *are* the sole basis of the contract with the said association; that I have signed this application in my own proper handwriting; that all provisions of law forbidding any physician who has or shall have attended me from disclosing any and all information which he acquired by such attendance, together with any such provisions affecting the uses which shall be made of this application, or any part hereof, and all provisions of law in conflict with or varying the terms of this agreement and policy applied for are hereby expressly waived; that the policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health; that no statement, to whomsoever or howsoever made, shall modify this
60 contract, or in any manner affect the rights of the association, unless the same be reduced to writing, and be presented to and approved by the officers of the association at the home office in Philadelphia, no agent or examiner having any power or authority to make or alter contracts, waive forfeitures or grant credit; that the proofs of death and claim required shall be made upon the blank forms furnished by the association, and shall include all information required thereby, and in accordance with the association's by-laws; that I will not without the written consent of the president engage in any occupation or employment more hazardous than that above mentioned; and that if any concealment, or untrue statement, or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void and all moneys paid hereon shall be forfeited to said association; provided always, that if the necessary payments be made to keep said policy in force, it shall in the event of my death be incontestable for the sum payable thereunder after three years, except as therein set forth.

Dated at Dallas, Texas, this 28th day of Oct. 1896.

W. A. HUNTER.

Signature of applicant must be in his own proper handwriting.

Witness:
A. J. BROWN.

The witness should be the soliciting agent.

Directions by Applicant to Association as to How Policy is to be Written (Not a Part of Application).

Residence of applicant: Town, ...; county, ...;
Give street and number.
State, ...
Business address: Town, ...; county, ...;
Give street and number.
State, ...

Amount of policy applied for, $——.	Premiums payable (erase except as desired) annually. semi-annually. quarterly.

State here the exact kind of policy desired.	Age, nearest birthday:
.....	.....

To whom and where shall notices of premium be addressed?	City:	County:	State:
.....	.....	.....	.....

For whose benefit is the insurance desired? (Write names in full and give relationship to applicant.) .....
.....

61 Examination made .....
by....., M. D., of.....
Give date. Do not fail to give correct name of examiner. Give post-office address.

What cash payment has been made to make the policy under this application binding from this date, providing the risk is assumed by the association?

A. ..... annual payment of $..... has been paid upon condition that if the risk is not assumed by the association, this sum is to be returned, in accordance with the provisions of the association's official binding receipt No. ..... given as a voucher for said payment.

.....
Signature of applicant. Write name legibly and in full in own handwriting.

The medical examiner must be in possession of this application at the time the examination is made.

The foregoing has the following endorsements, to wit:

Number D 73372. The Fidelity Mutual Life Association of Philadelphia. Policy of insurance on the life of William A. Hunter. Amount, 5,000. Date, October 31, 1896. Semi-ann'l rate, $32.55, payable the 28 day of each October and April. Add $3.00 per $1,000 to first payment. Age, 33. Name of agent, A. J. Brown.

62 Thereupon, on the same day, May 28, 1900, Mrs. JENNIE M. METTLER, the plaintiff, being sworn, testified orally as follows:

"I am the Jennie M. Mettler named in the three policies of insurance sued upon. I have examined said policies. I am the sister of William A. Hunter named in them. At the date of their issuance, October 31st, I lived at Pecos, Texas."

"The home of my brother, W. A. Hunter, would be in Loving county or Pecos; his home was out in the West, usually with me at Pecos."

"I had no children. My husband died in March, 1896. W. A. Hunter was not married in 1896. He was about 33 yrs. old. He was born near Homer, Licking county, Ohio. I came to Texas in the spring of 1886, and W. A. Hunter came either the latter part of 1885 or 1st of 1886. He continued to live here after coming in 1886. My father lived in Homer, Ohio, and has always lived there; has lived there 50 yrs. There were nine children os us. Six live at Homer and in that vicinity. There are four girls and two boys. Three of the girls are married; none of the boys are married.

"The last time I saw W. A. Hunter was the 3rd day of December, 1896, in Pecos. From the time he came out to Pecos—he had been in Ft. Worth; he came out to Pecos to go to Mentone, in Loving county, expecting to make proof of his section of land in that county. He had occupied his land for three years, and he was going up there to fix it up and to make final proof of occupancy; and he had some little bit of lumber up there and he was going to gather it up. He came to Pecos and got one horse which belonged to me, and a wagon and horse—it was stuff I had left when I lived at Mentone myself; it was my husband's; he
63 gathered these things up, took some provision for himself and team, and started out there for that purpose, and expected to be gone about a week or ten days. He was only going to stay there awhile and gather up things, and then he wanted me to come and stay with him awhile. He took some baled hay for the horses in the wagon and some provisions for himself in the shape of flour, lard, sugar, coffee, some can goods, took his bed, and a stove, and a few cooking utensils, enough for a camping outfit, a gun and lantern, etc. The horse that belonged to me which he took on this trip I had it brought into Pecos; the other horse he got about a mile out of town at the Powers' place. Some of the provisions which he took I had on hand. The stuff I had saved and the rest that I did not have he bought in Pecos; bought his baled hay at the livery stable. He left Pecos awhile before dinner—about 11 o'clock. On that day, prior to his leaving Pecos, he was there in Pecos—I suppose around about town. He was up to see me. He said he would

be gone on this trip a week or ten days. After he had been gone ten days and did not come back and then two weeks and did not come back—there was about fifteen days I did not hear anything from him, and I thought I ought to hear something from him in some way, shape, or form, and I sent a man out there to see if he was there and look for him and see why he did not come back. This man's name was 'Baird,' who lived at Pecos—at least, he was there when I hired him. I hired him to go up there. He said he went and did not see any evidence of his having been there at all. A few days later I sent Mr. Henry Slack and he came back and told me he did not find any evidence of his having been there. After this I met Mr. Gibson, district and county clerk of Reeves county, on the street. He got up a little party and they went up the river and found his camp, the wagon, and cooking things, and one horse that was dead and the other horse was gone. Mr. Mansfield and Mr. Tulk went with Mr. Gibson. Afterwards I went up myself with Mr. Johnson and his wife and little boy. When Mr. Gibson came back he reported to me what they had found. Then Mr. Johnson and others with me went up to the camp; found a wagon and a bed on the ground, cooking utensils, where there had been a little fire made, and a gun leaning against the wagon wheel. The skillet or oven had been used. When he left home with it, it was clean. Meat had been fried in it. We found some little feed left in the wagon—the horse
64 feed, and some provisions. I gave him a loaf of bread when he left, already baked, and he had used half of the bread. There was a can, looked like he had made coffee in it, and he had opened a can of tomatoes, and his bed was made down. A tarpaulin had been laid on the ground, and the bed, comforts, and quilts lying next, and over the top of that was the tarpaulin spread; end of it was turned up. A tarpaulin is made of real heavy material. Campers use it to keep the moisture from bedclothes. It is really heavy like duck or tent stuff. The bed was in a shape that somebody had slept in it and laid the cover back, and the imprint was there like the dampness and night atmosphere had assumed that kind of shape, just the shape of some one lying there. My horse was at the camp dead. The other horse was not there. There was hay scattered around the wagon; looked like some horse had been eating it. We found my brother's tracks going from the wagon to a point in the river where he had gone to get water; the buckets were there. I know my brother's shoe tracks. These parties up there on the day before had made some tracks around there, in other parts, tho' they had been very careful. Mr. Gibson was along and pointed out the tracks to me. We first followed the tracks from the river to the camp, and from the camp down to a little place in the river—kind of broken-off place; it formed a kind of peninsula. There was the print of a bucket; looked like the bucket had been drawn up and set down on the bank. The buckets looked like water had been in them and gradually evaporated, and there was sand in the bottom of the buckets. Then there was a footprint where he went to the edge of the bank, and this footprint never returned. The bank of the

river where the tracks went and never returned is sandy. It is almost perpendicular; it was a little slanting; I think it would be eight or nine feet, as near as I can make an estimate; it looked that way to me. The current of the river was swift, and swished up against the bank the day I was out. The river was quite wide at that place. Where the tracks went to the river and did not return there were some dry mesquite roots that were sticking up from the edge of the bank. These mesquite roots had grown out; part of them seemed to be lying on top of the ground; the root had been broken off & did not look like it had been broken long. The footprints were set in the ground, showing plainly that he had been breaking wood. The two footprints were near together, one a little in advance of the other. The ground is all of a loose sandy soil. They measured the distance that the footprints were from the edge of the river bank, and they said it was about 18 inches. I would say 16 or 18 inches. The two tracks last described were deeper in the soil than the others. Where these two tracks were the surface of the ground sloped off gently, just a little bit; probably a slope of 8 inches—I do not know—just a little slope came off to the edge of the river, just a little bit of the bank was broken off. Straight down from where the footprints were there was some loose dirt.

"My brother had an overcoat; did not find it at the camp; did not find his hat. He could not swim.

"My husband first went out on the Pecos in 1893. I have known something of the Pecos ever since. I have been to Mentone, but went on the train.

"At the time my brother left Pecos he was perfectly well. His mental condition was all right. In my opinion, he was above the average for intelligence. He had no personal or financial matters pressing upon his mind that I know of. He was of a cheerful disposition and kind; had a good disposition.

"My husband left no life insurance. He left me without anything at all; left me in debt. I have been supporting myself ever since his death.

"Q. State what is the general reputation in the family—your father, brothers, and sisters—as to the death of your brother, W. A. Hunter?"

To which defendant objected because it is incompetent and hearsay; 2, family reputation cannot establish or prove death, especially where it is 1,500 miles away; 3, it is competent for no purpose, especially when that reputation has been established since the institution of this cause of action.

Which objection the court overruled and said, "I think the question is one of weight to be given the evidence. It is a question for the jury to say whether or not family belief tends to prove his death."

To which ruling defendant then and there excepted for the reasons stated in the objection, and the witness thereupon testified;

"My father, brothers, and sisters all believe my brother to be dead."

66 Witness further testified, over the same objections made by defendant, which objections were overruled by the court, and then and there excepted to by defendant, "That the family believed he was drowned in the Pecos river, out in the West, and that this family belief has existed ever since I wrote them about it."

Witness was here handed a letter, which she recognized as written by herself and addressed to her father, dated December 30, 1896.

"I think I wrote it the day that I came back from the camp, from where we found my brother's camping outfit."

Court adjourned until 10 o'clock Tuesday morning, May 29th, when the following testimony was adduced:

Plaintiff on witness stand:

"I reported that my brother was dead. I know he wrote to and received some letters from the family. The very best relations existed between my father and brother. Never was any disagreement between them. The very closest of friendship existed between my brother and me; brotherly and sisterly love.

"In November, 1896, he was in the real-estate and farming business. That was all he had been doing to amount to anything. The land was situated in Loving county."

Picture was handed to the witness, which she identified as that of her brother, W. A. Hunter, and said:

"It must have been taken about six years ago. I have had it quite awhile. It was taken prior to October, 1896. It is a splendid likeness. The last one is a little older and a little more bald on the top of the head: otherwise it looks just like him."

Another picture was handed the witness, which she identified as the last picture taken that she knew of, and said that the last one was the better likeness; which two pictures were offered in evidence as the pictures of W. A. Hunter, and marked exhibits.

"I first learned of the insurance policies a week or ten days after the party had found the camp up the river. I went to Mr. Gage's first to talk to him about some matters. Mr. Gage is a lawyer and also an officer in the bank. He had his law office in the bank building. I had a note I wanted to know what to do with. I did not know how to proceed to collect it, or whether I could or not, and I wanted to ask Mr. Gage's advice. He then told me there

67 were some papers in the office. He told me what to do about the note, and said, 'By the way, there are some papers in the vault of the bank that my brother left with him.' He went and got the papers and opened them, and they were the insurance policies. That was the first I knew of the policies."

A paper was handed to the witness, who said it looked like the script that she found, and that it has her brother's name on it, and is county script of Loving county.

On cross-examination witness said:

"When my brother came to Texas he did not locate anywhere. He stopped at Ft. Worth the first I knew of. I didn't come to Texas

until March afterwards. I found my brother in Ft. Worth; do not remember what he was doing. I did not remain there at all. He came to my house afterwards and said he was there. He came to Itasca to see me, and said he was in Ft. Worth, and corresponded with me from there. I was located in Itasca the first summer I was in Texas. I don't know when my brother left Ft. Worth. He taught a term of school out at a little place named Crowley in the winter of 1887. I think he was book-keeper for Mr. Morgan at Alvarado the following year, which would be in 1888; think he was with Morgan in 1889; do not know whether it was in 1890 or '91 that he went to Quanah, Hardeman county, Texas; think it was '90, but am not certain. He and my husband had an office there together. I went on in October. I was there a year and a half, and he was there all that time. I left him there when I moved away; cannot locate the time when I left. I was there a year and a half and he was there with me, and he was then appointed deputy clerk of Hardeman Co. and served two years; do not remember whether my husband and I left there in '91 or '92. We went from Quanah to Hartley. My brother left Quanah in the spring, and from there he went to Mentone, Loving county, Texas, where he engaged in the real-estate and farming business, and looked after their irrigation business in Loving county. I do not know how large Mentone is, whether there is anything there at all or not. He went to Mentone in '93 or '4. Did not go with my husband. My husband left me in Hartley county, where he was living. He and my husband had a company organized for irrigating purposes to build a ditch. I can't explain that because I do not understand it. My brother was a member of the company. Do not re-
68 member whether he was an officer at first or not; later on he had; had his headquarters at Mentone, I suppose. I do not know anything about the business part of it. I was out at Mentone a little while in the fall of '95—in October. My brother was helping survey the ditch line. At that time there were very few houses in Mentone; might have been eight or twelve. My brother took up a school section in Loving county; it was organized at that time. My brother was sheriff of Loving county at the time he was there; do not know where his office was; there was no place for his office. I understand that he was also tax collector. I have seen some of his letters with a card on it; said 'sheriff and tax collector;' do not know where he kept his office as tax collector; there was no place there for an office. It was a new place and very few people there; only five women and a few men to do the work; cannot tell how many men. They all hired help, and sometimes there would be more than others; very few of them there; do not know what this county script was issued for. I only know of my husband's being an officer from what I heard. He never did any kind of work that I know of. He was a lawyer. I think my brother went to Mentone in '93. He made improvements, or had some made, on the school section. He did not go out there and stay there. We were all boarding at the same place up in town. He had a tent and some wire fence on the land; I don't know how much. The wire fence

enclosed very little land; not much larger than this court-room. There was a garden spot. The tent was a little square tent; can't give you the size of it; do not know whether he ever slept in it.

"He did not do much farming. He was working on this ditch, to get ready for it; he was preparing to farm.

"There was no use to do farming, because of lack of rain.

"He was digging the ditch and helping, so that when the water run it would make the crop grow; no use to plant anything on dry land; no water on it. They were building the ditch, and that is what he was there for. He had done no farming; only experimental farming. He planted everything he could think of to see if it would grow—planted corn, grain, potatoes, beans, lettuce, radish-, watermelon; I suppose an acre or more. They raised something every year they were there, so they told me. He was there three years.

69 "A. I don't know that he ever plowed an acre; I didn't see him do it. I know it was done, whether he did it or not. I know he raised corn; I saw it there, and pulled it off the stalk myself; not very many ears." "It was in November when I went there. I did not see very many ears of corn—I don't remember how many ears of corn—but I pulled an ear off the stalk myself and opened it; might have been a dozen stalks or a dozen hills; might have been two dozen. I don't remember anything about it; only a little ground there. I saw no watermelons raised there, as I went there in November. Nothing could be raised without irrigation. He watered that land; watered it with buckets. That was their farming operation. They had not got their ditch built, and they wanted to know what would grow. They were there experimenting for 3 years. They never did complete the ditch; it is not yet complete. I don't suppose it ever will be. There was nothing more done on the ditch December 10, 1896, than now. They abandoned it.

"My brother started from Pecos to Loving county on the 3rd of December to prove up his school section and make improvements.

"The purpose he wanted the school land for was that—

"When it is irrigated under this system they have there it is very valuable, and some day it may be yet.

"At that time the ditch was abandoned.

"He went up there to put up a shanty or something to hold the land as his claim, as all the others did. I don't know how large a house he intended to build, as he had not given me the dimensions. He was just going to make some improvements; fix some kind of a little house, so as to hold his claim. I did not say at the former trial of this case, at the last term, that he intended to take me up there to live with him. We were going up there; he was going up there and gather up some timber to fix up the house, and then he was coming back. I was going to stay with him until he got his work done, not to go there to live. He had to gather up some lumber. They had some lumber left from some of their buildings. He took an ax and saw to work with; ax and saw or a hatchet. At the last term I mentioned as many things as I could remember. I mentioned the stove

and stove-pipe, and the bed, and feed, and never mentioned any ax or anything of that kind. Now, you call my attention to it, and I remember it. I don't remember that I mentioned a saw, but
70 he took one just the same. I don't remember that I mentioned an ax, but he took it. I don't know all the things he took to make the improvements with; he may have gotten some other things down in town. I was present when the examining party discovered these things; found an ax there and a saw. I don't remember finding any nails; I did not think of them. He was not to do much work up there until he came back for me. The saw was a handsaw. The hatchet I took back to Pecos. I don't know whether I testified at the former trial that he had a hatchet. I cannot enumerate all the things he took; I might forget some. He took a bed, some can goods, flour, lard, coffee, sugar, stove, stove-pipe, saw and a hatchet, a couple of buckets. Of wearing apparel he only took a little colored shirt and an outside shirt to slip on over outside. He wore his overcoat; left the rest of his clothing with me in Pecos, that con-ted of a suit of clothes, and a suit of clothes in a grip; that was all the wearing apparel, besides some socks and things. I have sold all the clothes, and the grip, I don't know where it is; sold the clothes with my husband's clothes; sold them altogether, as I had no use for them; sold them at Ft. Worth; suppose it was to a second-hand man, as he was buying clothes; left the valise at Mr. Mignon's place at Ft. Worth about a year ago; went there last Saturday and did not find it. I don't know of my brother's going to Ft. Worth and engaging in the photograph business. He had that experimental farm at Mentone in the spring of 1896. When he left he said he was going to Ft. Worth. I got letters from him from there; don't know what he was doing in Ft. Worth. My brother was in Denison in the real-estate business at one time. While in Ft. Worth he was in a gallery with Mr. Swartz, and probably helped him in the gallery if he was not doing anything else. Don't know whether he was hired or not by Swartz."

Q. I understood you to say you knew your brother's track; how could you distinguish your brother's tracks from others?

A. I could distinguish—know they were tracks around the camp, and then you could follow them.

Brother had on a nice calf-skin, black shoe, broad toe. I cannot approximate the distance of the water from the top of the bank; I am only guessing at it; it looked to me like about 8 or 9 feet. The broken root to which I testified was about 18 inches from the
71 edge of the bank; that is as near as I can remember; I didn't measure it. The footprints were along southwest of the river this way (indicating on the paper and map that the toes were pointing up the river at an angle of probably 45 degrees).

Q. The broken end of the root pointed towards the river.

Witness said that at the time she saw the footprints on the bank of the river that other people had been there, but that she tracked her brother's tracks to that point, and that "she remembers same to be different from the others."

I made no measurement, and do not know of any one else having

done so. When brother left Pecos he had on a black suit of clothes. He always wore black. He had on a white shirt. He took a colored shirt. He wore off a white shirt and cuffs and collar, and took a colored shirt to put on over it; wore off a derby hat, I think. I went down there and saw the prints of the water bucket in the sand; cannot approximate the distance these prints were from the water. The contents of the grip or valise, as near as I can remember, was a suit of clothes, suit of underclothes, handkerchief or two, some old letters, little day book or account book. It was a canvas grip, and what is called a telescope; that is the one I left with Mignon at Ft. Worth. I know Mrs. R. S. Johnson; I stopped with her, and expect I was there in November or December, 1896; think I sewed a little while at Mrs. Johnson's; don't think I stayed all night; don't know whether I did or not. I don't remember having told Mrs. Johnson in a conversation while visiting her—staying with her—that my brother had taken out a policy of life insurance for my benefit, because he had not done it, that I know of. I don't remember that I told her in any conversation that my husband had died without leaving me any insurance, and that my brother had taken out insurance for my benefit.

I don't remember of my brother having told me he was going to take out insurance for my benefit. We may have talked about such a thing, but I don't remember that he said he was going to do it.

On redirect examination witness said:

Mr. Mignion has lived at Ft. Worth at least 25 years, I suppose. I had rooms at their house and lived there last summer, but I went home and left my brother's grip in the house when I left there. My brother has known Mr. Swartz ever since he came to Texas in 1885 or '86. Both Mr. D. H. and John Swartz were friends of his. They are photographers. He boarded at Mr. D. H. Swartz' house when he first came to Texas. Mr. D. H. Swartz had a brother living with him part of the time. His name was John Swartz.

72

R. D. GAGE, being sworn for plaintiff, testified:

I have resided in Pecos, Texas, since January, 1884, with an interval of about three and a half years, in which I lived in Ward county, about six miles distant from Pecos. I practiced law, and am connected with the bank at Pecos and own cattle; am stockholder and general manager of the bank. I make loans and pass upon securities. My position in the fall of '96 was the same. I have been a practicing lawyer for 20 years; have known plaintiff some five or six years; was acquainted with her brother, W. A. Hunter; first met him when Loving county was organized in 1893, in Pecos. W. A. Hunter was in my office in December, 1896, and handed me a package of papers sealed in a large envelope and asked me to put them in the vault, which was done; it was sealed and had his name on it. I cannot claim to have had an intimate acquaintance with Hunter. During the last time he lived out there in Loving county he was living across the river and came to my office two or three times a week. He appeared to me as a gentle-

man. He was a very mild-mannered, gentlemanly man, rather a good-looking man; he would attract attention in a town; he was not much of a talking man. As to intelligence, I thought he was above the average. He could talk well when he did, but didn't talk much. I never heard anything said against his character during those days that he lived there. He was a man, I presume, 5 ft. 10 or 11 inches tall; I think he had fair complexion, dark hair, dark beard or brown beard—mustache. Loving county was organized in 1893. The legislature in 1897 attempted to attach it to Reeves county, but the courts out there, the district court, decided it was unconstitutional. Prior to 1893 it was attached to Reeves county. The application for its organization was made to the commissioners' court of Reeves county, Texas. There was litigation instituted at Pecos, in Reeves county, to disorganize or cancel the organization of Loving county. I was connected as counsel with that litigation.

Q. So far as you know, was any trouble or any matter bearing on his mind, any mental or financial trouble, the last time you had a conversation with him?

A. Nothing that I know of.

73 I served as county attorney of Reeves county some 12 or 15 years ago; was county judge of Ward county three and a half years; was in the State senate one term, from the 28th district, in which Reeves and Ward counties are located, and quite a number of other counties.

It was three or four—possibly five—weeks subsequent to the time of Hunter's leaving the papers with me that I first learned of the contents of the envelope. Mrs. Mettler had called and was questioning me about some notes payable to Mr. Hunter's order, and the method of collecting them. I advised her with reference thereto. I told her her brother had left some papers at the bank, and got the package and asked if I would be permitted to open it. I told her that he left the papers there. There was no request for the papers. The trouble was the notes were payable to Mr. Hunter's order. She was questioning me how she could collect them, and after advising her about that I told her he left some papers in the bank, and I got them and brought them to her and tore off the end of envelope. There were three insurance policies and some other papers, county script, and may have been one or two notes in the package; some Loving County script (which witness identified upon the paper being handed him). The papers were redeposited in the bank. Mrs. Mettler left them there. Prior to the time I opened the envelope I advised her with reference to having a search made for her brother. It was not in that conversation that she learned about the papers. In fact, I did not think about them. It was not until after the searching parties had been up the river and she came to me about these notes that I mentioned to her about the package of papers. The camp had been found prior to the second visit. I advise- Mrs. Mettler with reference to the policies and to their collection. I think I wrote a letter for her to the home office, or formed a letter for her to write. I don't remember clearly what was done. I ex-

pect it was ten days or two or three weeks after the camp was found until I saw Mr. Milliken, the representative of the defendant company at Pecos. He was there a number of times, off and on. I presume he was there only a week the first time, and probably longer. I guess I may have seen him nearly every day while there. He called at the bank quite a number of times; came there sometimes on banking business. He would get checks cashed, possibly,
74 and then friendly calls. Of course, he was talking about his visit—about this Hunter business; talked to me about it.

Cross-examination:

The litigation instituted to disorganize Loving county was by the Texas & Pacific Railroad Company; it was the prime mover against the various officers, J. J. Combes and the commissioners' court, is my recollection, and Mr. Hunter, as sheriff of the county, and I think it involved all the county officers. Suit was instituted along in 1895 or '6, I think. I think it is not terminated, but is still pending. The parties were not in the country when the suit was brought. My impression is they had all left the county. I understood there had been no building in the county pertaining to the use of the county officers, though I have never been in Loving county. I was not connected with that case, but was in a case wherein the parties sued upon county script. The case I represented in part was the case of Clarke & Courts, stationery men of Galveston, Texas, against Loving county.

Q. Did you state before dinner the exact time this package was delivered?

A. It was in the early part of December, 1896. I don't remember the exact date; it seems to me during the first week in December, 1896.

The letter which I wrote or made a draft of to the company to be sent by Mrs. Mettler was subsequent to her last visit, the second visit I speak of, and the appearance of Mr. Milliken, I cannot remember the exact time. My recollection is that I wrote a letter to the company, but do not know whether it was prior or subsequent. (Witness identified the letter which he wrote upon its being handed to him.)

Redirect examination:

The suit I spoke of against Loving county, I think, was in 1894 or '95. I had no connection with it at all as an attorney. Of my own personal knowledge I don't know whether Hunter was in Loving county at the time that suit was instituted or not, and do not know whether they got personal service on him.

Plaintiff then offered the depositions of W. A. Hunter, Sr., Mrs. Birdie Yoakum, Elma L. Yoakum, Clara Hunter, Mrs. Lou Butcher, Mrs Minnie Householder, and Charles E. Hunter.

WILLIAM A. HUNTER, SR., testified:

75 That he was 71 years old and resided at Homer, Ohio, and had for about 53 or '4 years, and was by occupation a farmer during that time. He is the father of the plaintiff and W. A. Hunter, Jr., and also of the other witnesses last above named. Plaintiff and W. A. Hunter, Jr., lived at Homer, Ohio, until they went to Texas, about 1885. Since then a family correspondence had been kept up with them both regularly all the time until the fall of '96, when William A. Hunter, Jr., disappeared, and that the correspondence had continued with the plaintiff up to the present time. "The family relationship was always happy and affectionate in every particular. The habits of Wm. A. Hunter, Jr., were good, and his disposition, though retiring, was very congenial, and he was universally esteemed. He was intelligent and careful, and possessed the confidence of his family and friends in every particular, I believe, and seemed to be thoroughly contented with life, and I know of no reason to cause any change in his disposition. I could not tell exactly when any member of the family at Homer last received a letter from said William A. Hunter, Jr., but a short time before his disappearance. I last heard of him through Jennie M. Mettler, about the time he disappeared, and he was living at Mentone, Texas, I believe. I don't know with whom he was living."

The following question was asked each of the said members of the family, who testified by deposition:

The following question was propounded to the witness and to all the members of his family whose depositions were taken, to wit: Mrs. Birdie Yoakum, Elma L. Yoakum, Clara Hunter, Mrs. Lou Butcher, Mrs. Minnie Householder, and Chas. E. Hunter:

Q. If you know, state what is the general reputation and repute in the family as to whether said William A. Hunter is dead or alive. How do you know the general repute in the family as to whether he is dead or alive? If you know, what is the general repute in the family as to what has become of said William A. Hunter? As to the "family," who do you mean?

To which question and the answer thereto of each witness defendant then and there objected for the following reasons, to wit:

1. Because it is incompetent and hearsay.

2. Because family reputation cannot establish death when
76 the family is 1,500 miles away and the members testifying are alive.

3. It is competent for no purpose, especially when that reputation has been established since the institution of this suit.

Which objections the court then and there overruled.

And defendant then and there excepted to the ruling of the court; and the witness testified as follows:

That the general repute in the family is that William A. Hunter, Jr., is dead. He is supposed by the family to have drowned in the Pecos river; that is the general belief. By the "family" is meant the father and the brothers and sisters of William A. Hunter, Jr.

The witnesses Mrs. Birdie Yoakum, Elma L. Yoakum, Clara

Hunter, Mrs. Lou Butcher, Mrs. Minnie Householder, and Charles E. Hunter testified in substance as their father, and the same objection was made to their testimony concerning the family repute as to the death of the insured and as to the cause of his disappearance; and the same ruling was made by the court, and then and there duly excepted to.

J. B. GIBSON, sworn for the plaintiff, testified as follows:

I have lived at Pecos, Texas, since 1886. I am county and district clerk of Reeves county; have held the office about 12 years continuously; know Mrs. Mettler; think I first met her in 1895 or '96. I knew her brother, W. A. Hunter, at Pecos; last saw him about the first of December, 1896, at Pecos, in my office at the courthouse. He was a man above the average intelligence. He called in my office and sat quite awhile; probably our conversation lasted an hour and a half. He was rather a large man, with apparently an open countenance—frank, manly-looking fellow. So far as I know, his habits were good. The first time I ever met him was in '94, that I remember of. I made search for him in 1896. The last time I saw him was between the 1st and 3rd of December, when we had the conversation.

Some time during the day of the 26th of December, on my way from the clerk's office to my home, I heard about Mr. Hunter being missing, and I saw Mrs. Mettler. I spoke to her, and asked her if she had heard anything from her brother. I told a neighbor named Tulk about the rumor, and asked him to go with me to make a search for him. He and Geo. Mansfield went with me. On the morning of Dec'r 27th, 1896, we got a hack and team and pre-
77 pared ourselves to camp out. I went to Mrs. Mettler and got a description of Mr. Hunter's outfit, wagon, horses, and what he had in the wagon. We started east from Pecos river towards the bridge over Pecos river. Pecos city is about a mile and a half beyond the river. We crossed the river on the bridge and turned on the east side of the river, on the old Mentone road. I was on horseback and the other two men were in the hack. We followed that old road up the river on the east side. It is open for 14 or 15 miles above the bridge. I was riding in front of the hack about 150 yards, and watching for any indication of the wagon trail. At a point about 14 or 15 miles above the bridge I discovered wagon tracks turning to the left; I followed these tracks about 100 yards; I think they turned right square off and went down to a point about 100 yards from the road; there was a slough going down this way running parallel with the river; the wagon had been driven up the slough—there was very heavy mesquite brush; I followed the trail up there and the wagon had been turned to the left. At that point I got down and examined the track; I examined the tracks of the horses; it was my understanding there was a large horse and a small horse in the wagon; my object in examining the tracks was to find whether I was on the right trail or not; I saw one of the horse's tracks were large and one was small; I came to the conclusion that we were on the right trail, and I waited for the other

parties to come up; they had stopped the hack and come up to where I was; I told Mr. Tulk to go back to the hack and follow the road—the road running up the river, and the trail seemed to be running up the river. I told him to go back to the wagon road and I would follow this wagon trail. We traveled along there—I was hardly ever out of sight of the hack, the road and the train run parallel, the wagon trail running in through the brush I followed that slough—the wagon seemed to follow the slough; I followed that wagon trail a quarter or maybe a little more than a quarter of a mile up to where some cow trails crossed the slough going in towards the river; when the wagon got to that point it took the cow trail and turned across the slough; I then called Mr. Tulk to come on, and we would follow the trail they come, and we followed the trail through the brush; I was some distance ahead of the wagon, and they were following me; they were in the hack, I was on horseback. I followed this trail a quarter of a mile, I expect; at any rate, I came to a little point where there was no brush,
78 and looking in front of me about 100 yards, something like that, I saw a wagon, and stopped and looked and saw some hay—some bales of hay in the wagon, and from the description of the outfit I was satisfied that was the outfit. I stopped there; there was some buzzards there, and I stopped and waited until the hack came in sight and rode back to tell them I was satisfied the outfit was right there. Mr. Tulk followed along and George Mansfield and I went up to the wagon. The wagon was about a half a mile nearest point to the road, and about 125 or 150 ft. from the river. The wagon was standing with the tongue pointing to the southwest and a little down the river. The harness for two horses was found; two wooden water buckets, with a piece of rope tied in the bail; off to the right of the wagon, about 12 feet from the wagon, was a dead horse, tied to a mesquite bush with a rope about 12 feet long. On the right side of the wagon was a pallet made down. The spring seat had been taken off the wagon and turned upside down, and the wagon sheet laid lengthwise. The sheet was a tarpaulin; this was laid on the ground and spread out full length, with one end resting on the wagon seat. One or two heavy cotton comforts were doubled lengthwise and lay with the end on the wagon seat. Lengthwise of the wagon sheet and on top were two comforts spread out full size, and the wagon sheet had been drawn up over the entire bed. To the left of that, about 4 ft. south and away from the edge, was where there had been a little fire, and there was a skillet and lid. The skillet was setting right where the fire had been built, as if in the middle of the fire, and the lid laying against it. The skillet looked like it had been cooked in. Just behind the front wheel of the wagon, leaning against the axle, was a Winchester rifle. In the wagon were two bales of alfalfa hay and some flour, some can goods, some light bread, and several joints of stovepipe, and I think, maybe, a stove in the wagon and a few other such things. The bread had been untied, and there was still some of it in the paper. When I first saw the bed the center part of the bed had the shape of a man in it; looked so much like it we thought there was a man in it

until we got right up, and when George Mansfield started to raise the cover up he dropped it, and turned and looked at me, his face as white as anything could be, and I told him to raise it up; that if there was a man in it, it would not hurt him, and he raised the cover up. The appearance of the bed was as I have
79 described it; there was just the shape of a man there, as if a man had lay in bed; the print of him was in bed. I think both buckets had a piece of rope tied in the bail ten or 12 feet long, and on the bottom two or three inches around; the buckets had the prints of water having been in there and dried up, and a little red sand; they were both dry. The dead horse could not reach the wagon; it had been tied to a mesquite bush with an inch rope, and it appeared that the horse had been struggling to get to the hay in the wagon; he had gone out as far as he could with the rope; there was considerable trail beat around where he was trying to get to the wagon where the hay was. The trail was two or three inches deep. There had been other stock about the wagon and camp; there was the sign of another horse there, and we trailed that horse away from the wagon and back to the wagon at about a half a dozen places. I think one bale of hay had been eaten and tramped down; there was a great deal of trash on the back end of the wagon and laying on the ground.

After we didn't find Mr. Hunter near the wagon at the camp we began to make a search for him around the wagon, and we looked for a while, and finally we struck a trail leading in the direction of the river—tracks of a man; we traced these tracks to the edge of the river and back to the wagon.

The direction from the wagon to the river and back taken by these tracks was about due southwest. Where the tracks had gone down to the river there was a little peninsula or kind of a second bank that went out into the river; the tracks had gone down on this peninsula; there was a kind of slant from the bank down to the edge of the water on this peninsula. The tracks were all the same length and apparently made by the same feet. On a little bench about 15 or 18 inches on the peninsula was the print of a bucket where it had been set down, and at that print was a footprint with the heel toward the river. We were all together making a search, and we followed the tracks back to the river; we were walking along together, and at a point about 20 ft. from this little peninsula back east on the bank we discovered footprints leaving this general course and going toward the bank of the river at a point higher up. Footprints were perfectly distinct; some one said, Let's follow this print and see if it returns. We followed right up to the edge of the
80 bank and followed that until they went over a little slant; the top of the river bank was a little sloping; these two footprints, last two, were standing right on that slant, left foot a little behind the right. The footprints had been about half facing the river. The left foot seemed to have turned a little and slipped; the print of it was there, and showed that it had slipped; and just in front and just below where this bank dropped off perpendicular there was a mesquite root that had been broken off and a part of it

was sticking out of the ground. We could see none of these tracks were going back and away from the river; we looked to determine whether they did go away from it and we could not see any going away from there. The height*h* of the bank above the edge of the water, where this root was broken off, I should say was between four and five feet the first time we were there. This little slope came down and dipped in a little until it got down within about 18 inches of the water, and there was about 18 inches of sand from the bottom of the bank to the edge of the water at the time we were there first. The first time we were there was the 27th day of December, then again on the 29th, and I was there on the 20 of January following. On the latter date I saw the water in the river measured. At this time Milliken, Slack, and R. S. Johnson were with me. Mr. Slack went in the river. Mr. Milliken told him he would give him $5 if he would go into the river. On that day it was pretty cool; the river looked to me like it was pretty full and muddy and swift, and it was suggested to Mr. Slack that he tie a rope around him. He did so and one end of it was held by those who stood on the bank. Slack went into the river at this peninsula and came up along the edge of the water until he got right opposite where these two footprints were. There had been a rise in the river between the time I was there on the 27th of December, 1896, and the 20th of January, 1897; I know this, because it was higher at this time than it was the first time, and there was a sand bar against the bank about 3 ft. wide; I could tell because there was a print on that point; I had examined at that and that was not visible and I took a stick and measured down in the water and touched this place, and I should think the river was three or four inches higher than it was on the 29th of December. Mr. Slack came up to opposite where these footprints were and went out into the river,
waded out gradually until he came to where he couldn't wade,
81 and made some remark as to not being able to wade longer,
and Mr. Milliken told him to let down and hold up his hands, and he let down and the water struck him about half way between his wrist and his elbow. His head was under the water. He must have been between 15 and 20 ft. from the bank. At that time I think the current of the river was a little further away from the bank. The last rise, between the 29th of December and 20 of January, had thrown this bar there. I think the current was probably three or four feet further from the bank than on the 29th. The river was pretty swift in the main current. There was a difference between the bank at its foot, where the mesquite root was broken, and the appearance of the bank on January 20th—about three feet difference. This sand bar begun just above and opposite where these foot tracks were on the bank and extended almost down to that peninsula; that bar must have been three feet wide; that bar was not there on the 29th of December. It had been thrown there by a rise between the 29th of December and 20th of January. On a straight line from Pecos to where we found the camp it is about 12 miles. The way we went, crossing the bridge and following the road, it was at least 18 miles. The Pecos river is the most

crooked stream I ever saw; never saw anything to compare with it; you don't find 100 yards where it runs in a straight direction. I think it heads in Colorado, in the Rocky mountains, runs through New Mexico and through that portion of Texas to the Rio Grande. There is always a pretty good volume of water running in the river. It is always muddy, of a dark reddish color. It has a quicksand bed. I have known the Pecos ever since April, 1886. It is a quicksand river. It is very much the same at every point. This quicksand is right down close to the edge of the water. When there is a little rise and it begins to fall the water and sand seem to be perfectly loose. If you get on it you gradually sink down; you sometimes sink quick and others sink gradually. Pretty much all of the bed of the river is that way; at least, that is about the best description of the quicksand I can give; that is the condition at almost all points on that river. I have seen cattle sink in the sand; never saw an individual sink. In 1886 I went to that country with a herd of cattle. We had about two thousand head of steers. When they went to the river to drink I have seen as many as 30 or 40 sink down, and we had hard work getting them out, and some of them we did not get out
82 at all. That was something we had to do nearly every day as long as we watered cattle on that river, from the time we struck the river until we left it at Roswell. We must have lost three or four hundred head of cattle in that river. That is my ex-
1 perience. That is the condition on that river, especially after a little rise. Going from Pecos up to Mentone through the country on the road that we were going, the distance is about 40 miles. There are two crossings on the river from Pecos to Mentone that I remember. One was Rocky crossing, about 8 miles above Pecos, and the other right opposite Mentone. The camp outfit was not near the crossing; it must have been five or six miles above what we call Rocky crossing, between 7 and 9 miles above Pecos. The wagon was on the east side of the Pecos river. The usual crossing going from Pecos up there would be by the bridge between Barstow and Pecos. Barstow is east of Pecos, and the bridge is between these two towns. Barstow is east and Pecos is west of the river. Usually we cross at the bridge and go up on the east side of the river; go east until you cross the bridge, and then the road turns up on the east side of the river. Mentone is on the east side of the river. Barstow is about 4 miles from where the road turns up the river. The temperature of the water is about the same; it is always cold—just as cold at one time as another. A rise in the Pecos does not depend upon rain; snowfall affects it; it is fed by snow a great deal.

There was a distinct water mark showing it was 18 or 20 inches higher than it was on the 27th. Going from Pecos to the river, it is practically open after you cross and turn on the east side. It is very near two miles from Pecos to the river at the bridge. If you cross and go up this side—at that time there was considerable heavy brush; it has since been cleared away and put in cultivation—after you reach the open about six or seven miles above the

bridge, you pass through some open country; then, after you get over the little range of hills, you come down into a valley again and go into very dense mesquite brush. At and surrounding the camp the character of the soil is sandy—red, sandy soil. It seems to me that there was one pasture gate at that time that you had to go through in making that trip along that road in about December. I think Johnson's pasture fence was just about opposite this wagon crossing that we called Rocky crossing, about eight or 10 miles above Pecos. The camp
83 was 14 or 15 miles from the bridge. Quicksand shifts from one place to another with the rise and fall of the river. The current of the Pecos river changes every time a rise comes to amount to anything; you hardly ever see the current at the same point after there has been a rise; it just flops over one way and then the other. The river will average about 180 feet in width. At the time we went up there, when Slack went into the river, the water at that point was not 180 feet; it must have been at least 60 ft. wide; I expect more than that. He went out in there about 20 ft., and I am satisfied he did not go more than one-third of the way. I don't know how far it was from where he let down to the west edge of the water, but he went down gradually in the river until he reached a point about 18 or 20 ft. from the edge of the water—he went down until he went out of sight—and I am satisfied the water must have been something over 6 ft. deep; that was probably the deepest place in the stream. The main current was not quite so far out as he went down.

Court adjourned until Wednesday morning, May 30, when the following testimony was adduced:

GIBSON on the stand:

On the 29th of December Mr. Slack and myself went down the river from the wagon where the outfit was found; followed the meanderings of the river—followed the bank quite a distance down the river. We did not follow it quite to the dam, the headgate of the Pioneer canal; we followed down as far as we could go right close to the bank, so we could see the water as far as we could see it. That was on my second trip to the camp. We were searching for the missing man, Hunter. I was district clerk at Pecos, and also when the civil suit was filed against the same officers. W. A. Hunter was at Mentone at the time, and personal service had on Hunter by the sheriff at Mentone. As well as I can remember, the suit was filed about the March term, 1895, and service might have been gotten, but I know Mr. Hunter was there at the September term, 1895, in person. These suits have never been tried.

I don't know who was first elected sheriff of Loving county; there was some man elected when the county was organized, but I don't remember the name. It was not Hunter; he was not the first sheriff; he was the first sheriff qualified; my recollection is
84 the man first elected was not qualified; all the officers qualified before me but the sheriff.

I think Hunter was not there at the time Loving county was or-

ganized. He was not with the officers when they came down to qualify.

On cross-examination witness said:

I have testified before in this case by deposition and by oral examination.

Q. Didn't you testify at the last trial that you followed the meanderings of the river about 9 miles?

A. I don't know whether I testified that way or not. It would be hard for me to tell.

It is a fact that I testified in my deposition that the average bed of the river was -bout 90 to 100 ft. in width. I think I stated in my deposition that the bed of the river right opposite the mexquite root was probably 65 or 75 feet. The water in the river and the average depth of the bank was six feet, and the country almost perfectly level; that is true today. It was between ten days and two weeks after we discovered Hunter's camp until I was acquainted with the fact that there was insurance on him. I got the information from R. S. Johnson, before Milliken came to Pecos city. I testified by deposition, "I first learned that Mr. Hunter's life was insured by R. S. Johnson about a week after Mr. Hunter's outfit was discovered." My memory was better then than now; it was not quite so long after the transaction. We found the following articles at the camp: Harness for two horses, including bridles, collars, &c.; a bed with two or three comforts; wagon sheet or tarpaulin, skillet and lid, and in the wagon two bales of hay, some can goods, some flour, some light bread, knives and forks and tin plates, two water buckets on the ground near the wagon, and, I think, some stove-pipe, probably one or two joints, and that is about all I remember. I don't remember whether I saw any hand saw or not. I don't remember that I testified about a hand saw on the former trial or in my deposition. I don't remember that I saw a hand saw there or an ax. I think I saw a hatchet; cannot say positively that I testified before that I saw a hatchet. In my deposition it is true that I purported to give a list of the articles found and described each in answer to interrogatory No. 7, and in the next interrogatory was again asked the question, and in my answer referred to in interrogatory
85 No. 7, and stated that I gave a list of all the articles therein.

The witness was handed his deposition and admitted that his answer to interrogatory No. 7 did not mention the hatchet. He also admitted that in his answer to interrogatory No. 12 that it alleges as follows:

I have given an itemized list of all the articles found on the ground at the camp in interrogatory No. 7. My memory was fresher then than now. It took me two or three days to answer that deposition; it may have been six days. I took all the deliberation I wanted. It is a fact that I was better qualified to tell the true state of facts at that time than at present, but there was so many of these questions I might not have remembered this particular thing. I think I mentioned the hatchet in the affidavit I made immediately after the occurrence, tho' I have not seen it since it was made.

On the 27th of December, 1896, the water at the foot of the peninsula that run out in the river was 18 inches below the foot-

prints. There was one distinct footprint on that point, and there was one other print that I took for a footprint on the 27th, but that was near the edge of the water. The water was about two inches below what I took to be a distinct footprint. At the time Mr. Slack waded out in the river and went down in the water—at the time he let down—he came out and stated that the bottom was hard. That was immediately opposite the broken root, where it is assumed Hunter fell in. My recollection is that Slack went down on the peninsula and came along the edge of the bank until he got opposite where the footprints were, and then went out in the stream. Out at the peninsula he waded into the water until it was about waist deep. I didn't say that there was quicksand right opposite where the root was broken; there was sand on the opposite side of the river; there was a bank of sand on the side where the root was broken on the 20 of January, 1897; that was where Slack waded into the water. I did not say it was quicksand; said there was a sand bar there. There was sand there; it might have been quicksand; there was sand there on the 20th. Mr. Milliken had to put the spade on it to stand. I did not go down there to test it, but it was quicksand. I don't remember whether Mr. Slack had any trouble in walking out on it. After he got out of the river Mr. Milliken asked him about the bottom of the river, and he said it was firm. He went out 18 or 20 ft.; went straight out opposite where the root was broken off; he didn't mire up in wading up and down, and did not complain of quicksand; did not seem to have any difficulty in wading up and down, except the current of the river. I call a stream swift that would be difficult for a man to swim straight across; from 7 to 10 miles per hour would be swift. I think that stream travels that fast.

86

Q. Did you ever see a swift stream whose current is as tortuous as this—that is, as winding; did you ever see a swift stream that had a crooked bed?

A. I have seen a good many swifter streams than the Pecos. Of course, if a stream was straight the current would be swifter.

Mr. R. S. Johnson accompanied us in the searching party on the 29th of December, and his wife and Mrs. Mettler.

Witness then placed his foot on a piece of paper, assuming that the edge of the paper was the bank of the river, in the same relative position, according to his recollection, as where the footprints discovered by him at the place where the broken root was found, which were placed at an angle of about 45 degrees, the toes pointing up the river, the distance between his feet being about 4 inches.

Witness testified that the toe of the right foot was about 12 or 14 inches from the broken root; probably 18 inches. The footprints at the broken root were about 18 or 20 ft. from the peninsula. The wagon was about 150 ft. from the broken root. We made measurements there in January, 1897; made none before that time. (A diagram with the measurements placed thereon and having the signature of the witness is handed to him and identified as being correct and same was offered in evidence and is as follows, to wit:)

(Here follows diagram marked page 87.)

Exhibit "A"

1. Hunters wagon.
2. Where bed was made down
3. Where fire was kindled
4. Where harness was found
5. Where dead horse lay
6. Where bush stood that horse was tied to
7. Where 2 wooden buckets were found
8. Where coat was found
9. A line from wagon to river 170 feet long where foot prints went and returned from Pecos River.
10. A point of divergence.
11. A point on River bank where the two foot prints were on bank of river.
12. Peninsula where foot prints went down river bank.

Endorsed on back: George Estes, E.P.Reeves Co., Texas. (Seal)

PECOS RIVER

NORTH

No. 428
Geo Estes
vs
Motter

87

88 The wagon was standing where the letter "B" — on the diagram; "X" is the broken root; "C" is the peninsula. At the point "I," just 7 ft. and 9 ins. from the point "X," I think the water was three ft. deep. I swore to it in the affidavit, and I think it states that it was that deep at that point. From the perpendicular portion of the bank to the water's edge, where the root was found, there was a little slant about 18 inches wide. I was there on December 27th and again on the 29th and saw no indentation like as though a falling body had struck it, except a little scarred. I said yesterday the water must have been three or four inches higher on January 20th than on December 27 and 29, 1896.

89 I think it was a little more than that; must have been six or eight inches higher. The footprints were not covered on the 20 of January, 1897, on the peninsula. This indistinct footprint was covered. The mark of the buckets was on the second bench of the point from the water's edge. When we arrived there on the 20th of January I noticed that this little bench where the indistinct footprint on the peninsula was covered with water. I told Mr. Milliken and described — to him. We could not see it. I pushed a stick down right over where I knew this indistinct footprint was—pushed it down until I touched something, and the stick stopped.

Q. This point was tolerably hard. There was very little sand in it. There was sand right on top where this bucket print was; down around the edge of the water was mostly roots. In my deposition I think I testified that the indistinct footprint was 8 inches above the water. I think now it was 8 inches, and the water was about 18 inches below the distinct footprints; that would make the water about 14 or 16 inches lower than the indistinct footprint on the 27th and 29th of December. On the 29th of December the water was an inch or two below the indistinct footprint. The indistinct footprint was what seemed to be the impression from the ball of the foot. These footprints were the ones on the peninsula.

Witness said that at the point where the root was broken it was broken on the upper side, showing that it had been pulled up. There was underneath the root —, as if it had been pulled out of its place, and when it broke it made an indentation in the earth beneath. (Witness showed how it was broken, and stated that the broken end of the root pointed toward the river, and, in indicating the manner of the break, showed that the party breaking it pulled away from the river.) The pile of ashes at the camp was a small place—12 or 14 inches. There was some broken twigs there around the ashes and a stick of some kind of wood there about the same size which corresponded with the same size and character of wood as the broken root found on the bank. I compared that found at the fire with that broken off in the bank; took the remainder of the root out of the bank. My recollection is Mr. Milliken dug this piece of wood out of the bank and turned this stick of wood found at the fire over to me, and I carried that home, and carried home the rope, put them in my dining-room, and they lay there for over

a year. My wife carried them out into the barn, I think, and
90 the wood was burned by some washwoman, and I don't know what became of the rope. That was the only large piece of wood at the camp, and it was a good deal larger than any other piece. I think I made two trips up the river with Milliken. The second one was in February, 1898; Milliken, Slack, and R. S. Johnson and myself went on the second trip. The measurements were made January 20, 1897. Some photographs were taken on the trip in 1898.

On redirect examination, witness said:

Beds of quicksand lay along the edge of the water, and during a rise or just after a rise as the water begins to fall is when the sand is most dangerous. When the river is flushed a body will sink down; when the river is up a body will sink down out of sight. After the water goes down, and after a time elapses, the sand gets firm, and then we can walk on it. An animal can go upon it with perfect safety after the water has been gone down off of it for a while, but when it comes up and recedes or gets full of water it is quick, and a body with any weight will sink right down into it. The digging up of the root changed the surface and formation of the bank considerably.

Witness identified the photograph taken, and stated that it showed his position and the position that his hand was resting when the photograph was taken. The photograph was offered in evidence.

Milliken took the photographs with a kodak. Other photographs were taken by Milliken, and I was taken in several different positions.

F. M. Etheridge, being sworn for plaintiff, testified: I am a lawyer, and reside at Dallas; have practiced law 20 years. The following question was propounded:

Q. This is a suit upon three policies of insurance for $5,000, the assured being the brother of plaintiff, and who is beneficiary; it is alleged by plaintiff that he was drowned on December 4th, 1896, about three years and a half ago; she seeks to recover on these policies.

Defendant pleads insufficient proof of death. Further, that the application for insurance states that her brother was a farmer and real-estate agent, and that that was not true. They say he is not dead, but living; which suit has been pending for three years; evidence has been taken at the point of the alleged drowning out at
Pecos, taken at Nashville, Tennessee, and Homer, Ohio, and
91 there has been a contest on the issues all along the line. Please state what, in your opinion, would be reasonable attorneys' fees.

To which question defendant objected because attorneys' fees and statutory penalty are not recoverable against a mutual association, as it is alleged, because the statute allowing the attorneys' fees and penalty is contrary to the Constitution of the United States and of

the State of Texas, and because they are not recoverable under the Texas statute.

Which objections were by the court then and there overruled; to which ruling of the court defendant then and there excepted, and the witness answered that a reasonable attorney's fee would be $2,500.00.

GEO. A. KNIGHT, witness for plaintiff, sworn, testified:

I reside in Montague county; have resided at Pecos, in Reeves county, Texas. I went there first in 1884; resided there three years. I was United States marshal of this district three years. The nature of my business while at Pecos was trying to build the town of Pecos and help develop the country. Bought the land where the town now stands. The town then was down close to the river. I moved the old town to where it now stands. There were 65 houses. While out there I was engaged in the irrigation business and real estate; was familiar with the Pecos river; had occasion to make a study of it before I went there and afterwards. The Pecos is a narrow river, comparatively, with a great deal of water in it; it is said to run more water than any river in Texas; I don't know whether my information is entirely reliable or not. It is a river that runs as much water as the Trinity, at least; perhaps not so much as the Trinity does at times. The Trinity at times runs more water than the Pecos does at any time, but ordinarily it runs more than the Trinity. It is a narrow stream, comparatively, with very steep banks. There is a great deal of quicksand in the river at very many places. I consider it dangerous; I got into it once—into the quicksand; came very near not getting out, and was duly sober, too. I was trying to get a sheep out; the sheep couldn't get out, and I got down in there to help it out and got into the river myself, and got into the quicksand; that was near Pecos city. The banks were steep. I know from living there as long as I did; I know, of course, a great deal about the character of the river and current;
92 it is a very swift stream when the water is up, and is always up, comparatively; there is always a large body of water; I never saw it when I could see the bottom of it; I never saw it low in the deepest parts of it. The nature of the quicksand is to shift. I organized the first irrigation company out there.

On cross-examination witness said:

I went there in 1884, and left there in December, 1888. A dam across the river at Eddy, New Mexico, was begun about the time I left, and has been completed since. All the water above the dam is not taken up in Eddy. I don't think all the water that comes down is the seepage from the springs on the bank of the river. I think there is less in the river below Eddy now than there was before the dam was built; not so very much less. I have never seen the river in the summer time below Eddy get so shallow that you could jump across it; have not seen it so low that it was not more than a foot or foot and a half deep, but I have not been there much since. They do not irrigate in December.

The plaintiff offered in evidence a statute of the State of Pennsylvania entitled "An act relating to warranties in applications for life-insurance policies," which is as follows, to wit:

SEC. 1. Be it enacted, etc., That hereafter whenever an application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statements in such application, made in good faith by the applicant, shall effect a forfeiture, or be a ground of defense in any suit brought upon any policy of insurance issued upon the face of such application, unless such misrepresentation or untrue statement is relative to some matter material to the risk.

R. W. FINLEY, witness for defendant, being sworn, testified as follows by deposition taken June 14, 1898:

I am comptroller of public accounts of the State of Texas, and have been since the 15 of January, 1895. Records pertaining to the assessment and collections of State taxes and bonds of county tax collectors and all vouchers for the disbursement of State funds are kept in my office.

The records of this office show who held some of the county offices in the State of Texas for the past 6 years, but not all of them.

93 Copy of the bond of W. A. Hunter, insured, as tax collector of Loving county, Texas, under appointment made on the 16th day of September, 1893, and payable and conditioned as required by law, with H. B. Taylor, W. A. Hunn, and S. F. Miller as sureties, and dated 16 day of September, 1893, was introduced in evidence; said bond was in the sum of $926.87.

Another bond of the said Hunter, as tax collector of Loving county, Texas, dated February 10, 1895, in the sum of $950.00, payable and conditioned as required by law, with W. A. Nunn, Etty M. Todd, S. L. Miller, and B. F. Sprinkle, of Loving county, as sureties, was introduced in evidence.

The first bond above mentioned does not show to have been approved by the comptroller. The second bond was approved Feb. 13, 1895.

I attach to my deposition certificate showing who was tax collector of Loving county, Texas, for each year while it was an organized county, marked "Exhibit E" and made a part of this answer; which certificate and "Exhibit E" is as follows, to wit:

"AUSTIN, TEXAS, *June* 13, 1898.

I, R. W. Finley, comptroller of public accounts of the State of Texas, hereby certify that the records of this office show that W. A. Hunter was sheriff and tax collector of Loving county, Texas, from its organization until it was disorganized, or for the years 1893 to 1896, no record being in this office to show who held those offices from November, 1896, until it was disorganized in 1897. This certificate is made a part of answer to interrogatory 4.

Witness my hand and official seal, at office in Austin, Texas, this 13th day of June, A. D. 1898.

[OFFICIAL SEAL.] (Signed) R. W. FINLEY,
Comptroller.

W. B. WORTHAM, for defendant, testified by deposition taken June 14th, 1898, as follows:

I reside in Austin, Texas; am treasurer of the State of Texas, and have been since January, 1891. I am custodian of all records of cash receipts and land accounts. The records of the treasurer's office do show what amounts have been paid on the accounts of W. A. Hunter for sections numbered 34 and 46, certificates number-
4989 and 4995, surveyed by the T. & P. Railway Company, and
located in Loving county, and a copy of which account is
94 hereto attached, marked "Exhibit A" and "Exhibit B," and
made a part of my answer to this interrogatory.

Defendant offered certificates of John W. Robbins, treasurer of Texas, which are as follows, to wit:

"File No., 35718; Ledger 25, page 41; W. A. Hunter, Loving county; section 34, block 55; certificate 4989; T. & P. R. R. Co.; value, $1,280; note, $1,248.

First payment, $32.00; interest, 5 %; receipt No. 10004; date, September 27, 1893, Pecos.

Date.	Principal.	Principal.
Sept. 6, 1893.	To obligation.	$1,248.00.

Forfeited; non-payment int. to 8, 1, '95.

STATE OF TEXAS, }
Travis County. }

I, John W. Robbins, treasurer of the State of Texas, hereby certify that the above and foregoing is a true and correct copy of the account of W. A. Hunter for the purchase of above-mentioned land, showing all payments made on said account as appears in Ledger 25, page 41, of this office.

Witness my hand and seal of office, at Austin, Texas, this May 31, 1900.

[OFFICIAL SEAL.] (Signed) JNO. W. ROBBINS,
Treasurer of the State of Texas."

"Filed No., 35969; Ledger 25, page 136; W. A. Hunter, Loving county; section 46, block 55; certificate 4995; T. & P. R. R. Co.; value, $1,280; note, $1,248.

First payment, $32; interest, 5 %; receipt No. 10182; date, February 5, 1894, Mentone.

Date.	Principal.	
Jan. 24, 1894.	To obligation.	$1,248.00.

Forfeited; non-payment int. to 8, 1, '95.

STATE OF TEXAS, }
Travis County. }

I, John W. Robbins, treasurer of the State of Texas, hereby certify that the above and foregoing certificate is a true and correct copy of the account of W. A. Hunter for the purchase of above-mentioned land, showing all payments made on said account as appears in Ledger 25, on page 136, of this office.

Witness my hand and seal of office, at Austin, Texas, this
95 31st May, 1900.

(Signed) JOHN W. ROBBINS,
[OFFICIAL SEAL.] *Treasurer of the State of Texas.*"

Defendant offered the certificate of commissioner of land office, as follows:

"THE STATE GENERAL LAND OFFICE,
AUSTIN, TEXAS, *June* 14, 1898.

I, Andrew J. Baker, commissioner of the general land office of the State of Texas, do hereby certify and hereby cause the seal of the general land office of the State of Texas to be affixed thereto that W. A. Hunter filed his application and obligation in due form on September 13, 1893, to purchase section 34, township 55, certificate No. 4989, T. & P. R. R. *R.* Co., containing 640 acres of land, classed as dry agricultural land, and at the price of $2.00 per acre; that the State treasurer of Texas filed the receipt for said Hunter in this office on September 27, 1893, for $32, being $\frac{1}{40}$ of the whole purchase price, the same having been paid by J. J. Combs for said Hunter, and the land was awarded to the said Hunter September 28, 1894; that no interest has ever been paid on his obligation; that the said Hunter also on the 27th day of January, 1894, filed his application and obligation in this office in due form for the purchase of section 46, township 2, block 55, certificate No. 4995, T. & P. R'y, grantee, containing 640 acres as dry agricultural land, and at the price of $2.00 per acre; that the treasurer aforesaid filed the receipt for the sum of $32.00, paid by the said Hunter as first payment, being one-fortieth of the whole price; that no interest has ever been paid on the said obligation; that both of the foregoing obligations were forfeited on February 8, 1897, for the non-payment of interest for the years 1894, 1895, and 1896, the treasurer not having before reported the accounts as delinquent; that immediately after the forfeiture the said lands were again placed on the market by a formal notice sent to the county clerk of Loving county.

All of which appears from the records of this office; that I have not been able to find any other land in Loving county or elsewhere applied for by Hunter.

In testimony whereof I hereunto set my hand and the seal aforesaid this 14th day of June, 1898.

96 (Signed) ANDREW J. BAKER,
Commissioner.

[Official Seal, General Land Office.]"

Mrs. R. S. JOHNSON, for defendant, testified by deposition:

I reside in Reeves county, and have since the 1st of 1895; am the wife of R. S. Johnson, who resides in Pecos, Reeves county, Texas; am acquainted with Mrs. Jennie M. Mettler; have known her since March or April, 1896; am well acquainted with her, she having been a visitor at my home at one time for about one month. Mrs. Mettler and I were on friendly terms during the year of 1896. She was with my people from the latter part of August to latter part of September, 1896; was at my house frequently thereafter. I never visited Mrs. Mettler more than once or twice. I had a home in Pecos during the year 1896, and kept house during said year. After she visited me for a month in 1896, she made several visits when she would remain for a period of one week and later on continued her visits, but only for an hour or two at a time. Some time during the month of September, 1896, Mrs. Mettler told me that her husband could never get insurance on his life on account of bad health, but that Will (meaning W. A. Hunter) had his life insured in her (Mrs. Mettler) favor. This conversation took place about two or two and a half months before W. A. Hunter was reported to be dead. W. A. Hunter was in Pecos the last time from the latter part of November to about the 3rd day of December, 1896; left Pecos to go to Mentone, Loving county, Texas. Mrs. Mettler and I had a second conversation on the subject of life insurance at my home about the latter part of December, 1896, or the first of January, 1897. During this conversation I asked Mrs. Mettler if Mr. Hunter had his life insured. She replied, "Yes." I then asked her for how much he had his life insured. She replied, "I don't know." I then asked her in whose favor he had insured his life, and she replied, "In my favor." I said, "Oh, yes; you told me that once before." She said, "Yes; I did." This is all that was said during the second conversation.

On cross-examination witness said:

Moved to Reeves county in 1890. I had only known W. A. Hunter a few days prior to December, 1896; met him the first time about the 29th or 30th day of November, 1896; was introduced to him at my home in Pecos city, Reeves county. No one was present at the time
97 except Mrs. Mettler, W. A. Hunter, and myself. Mrs. Mettler brought him to my house. All the time consumed in conversation between Mr. Hunter and myself would not exceed two hours. Was not acquainted with S. L. Mettler, husband of Mrs. Jennie M. Mettler. Don't know when Mr. and Mrs. Mettler came to Pecos, if they ever did. Mr. Mettler never did live in Pecos; am informed that he lived for some time at Mentone, Loving county, Texas.

F. E. BOOTH, witness for defendant, testified by deposition taken 9th day of June, 1898:

Am 60 yrs. old, and am a farmer and contractor. In the months of November and December, 1896, was engaged in building a section of a dam across the Pecos river. The work done on the dam was for the Pioneer Canal Company. Began work on the dam No-

vember 23, 1896, and quit on December 1st, 1896. Said dam is situated across the Pecos river. It is constructed of mesquite trees and mesquite brush, salt grass, and earth. The dam was rather compactly built; but little of the water trickled through it. It raised the water in the channel of the Pecos river about 5 or 6 ft. The dam was in good condition when I quit work on it. Had no further connection with the dam after December 1st, 1896. A time-table was kept by me; was kept for the month of November, 1896. Said time-table was kept on the workman's monthly time book, such as is in common use by contractors, and contains the names of the workmen, the date when they began work, the number of days work done by each man, and the number of hours each man work- per day; also shows total time each man worked in each month, rate per day paid each man, and the total pay received by each man. I have said time-table in my possession. The book in which said time-table was kept is hereto attached, marked "Exhibit A," and made a part of this answer. I know the mode of the constitution of the head gate of the Pioneer Canal Company. The foundation of the head gate is built of rock and cement. The gate itself is constructed of heavy cypress timber. The head gate is composed of six small gates, any one of which or all of which may be opened or closed at the same time. A body or substance the size and shape of an ordinary-size man in the Pecos river at any point from 5 to 10 miles above said dam, to have gotten into said river below said dam during December, 1896, or January, 1897, would necessarily had to have gone over the dam or through the head gate. If it had
98 gone over the dam, it would remain in the river; if through the head gate, it could never have been returned to the river unless gate No. 4 was open at the time.

On cross-examination witness said:

I resided in Chicago in 1880; was then traveling railroad expert on construction; resided in Chicago until about the year 188- or '89; I then removed to Eddy, Eddy county, New Mexico, when I took charge of an outfit for construction of what is known as the P. I. & I. Co's canal; completed my part of this work about the month of November, 1889 or '90; soon after that took charge of an outfit for construction of a canal in Chaves county, New Mexico, for some company; was employed in this work until April 1st of the year following; was then employed on what is known as the six-mile dame—six miles east of Eddy; remained on this work until about October or November following; was then removed back to Chaves county, New Mexico, and put to repair-work on canal; was engaged in this work until about the month of January following; continued to work for the P. I. & I. Company in New Mexico until the following April; was then put to work on the Highland dam and canal in Reeves county, Texas; remained on this work until the following December, and then took contract on Highland canal; remained on this work until about August, 1892; after this time took contract to construct canals in Reeves and Ward counties for the Pioneer Canal Company. Ever since August, 1892, have been working for the Pioneer Canal Company and its successors off and on; have also done considerable farm-work during said time.

W. H. DENNIS, offered by defendant, testified by deposition taken May 30th, 1899, as follows:

Am 45 years old and have resided in Reeves county for the last 5½ years; since November, 1895, I have been water master for the West Valley system of the Pioneer Canal Company and its successors; my duties as water master consist of the care of the head gate and dam, 3½ miles of canal, and the flume across the Pecos river, supplying water to the flumes in the West Valley system. I am also observer for the United States Geological Survey, hydrographic branch, since October, 1898, under which position my duties chiefly are to take observations twice every day, and the stage of the water in the Pecos river and the flume across it. To the best of
99 my recollection on December 1st, 1896, the Pecos river was from four to seven inches higher than it was on May 10, 1899. I think there was very little change in the stage of water on the 3rd and 4th of December, 1896, as compared with the 1st day of December, 1896, except that the river was falling. My daily observations are taken at the flume seven miles north of Pecos city, on the Pecos river. The United States Geological Survey requires a report at the end of each week. This report is sent to Prof. T. U. Taylor, at Austin, Texas, under whose supervision I work. This is in addition to a book of permanent record which I keep. My daily tally-sheets shows for most of May, 1899, from which these reports and records are made, is herewith attached, and marked "Exhibit A." This is the paper on which I made the original entries.

"Exhibit A" as follows:

Gages at Flume, May, 1899.

	River.		Flume.		West valley.		Hd. gates.	Weather.
	6 a. m.	6 p. m.	6 a. m.	6 p. m.				
Ap'l 30	1.0	1.0	1.5	1.5	4	hds.	70 cogs.	Fair.
May 1	1.0	1.0	1.3	1.2		"	"	"
2	1.0	1.0	1.3	1.3	3 300	"	"	"
3	1.0	1.0	1.2	1.2	3	"	"	"
4	1.0	1.0	1.2	1.2	3	"	"	"
5	1.0	1.0	1.2	1.2	2	"	"	"
6	1.0	1.9	1.2½	1.4	"	"	"	"
7	1.0	1.0	1.5	1.6	3	"	"	"
8	1.0	1.0	1.6	1.6	3	"	"	"
9	1.0	2.1	1.6	1.6	3	"	38	" Lt. showers.
10	1.6	1.4	1.4	1.5	....	.....	48	" Clear
11	1.0	1.0	1.6	1.6	200		55	" Cloudy.
12	1.0	1.0	1.5	1.4	1		"	"
13	1.0	1.0	1.5	1.5	1		"	"
14	1.0	1.0	1.5	1.5	1	"	70	"
15	1.0	.9	1.5	1.7	3	"	"	"
16	.9	.9	1.6	1.6	3	"	"	"
17	.7	.7	1.6	1.6	3		100	"
18	.5	.5	1.5	1.5	5		"	"
19	.5	.5	1.5	1.5	5		"	"
20	.4	.5	1.5	1.6	5		"	"

During the last 4½ years it has been my business to note the stage of water in the Pecos river at least twice every day, usually at the flume. In October, 1896, I was absent about twenty days. In June, 1898, I was absent about one week, except which times I do not recall any occasion when I have missed two daily observations, and very often take three or more. The Pioneer Company's dam is constructed of mesquite brush laid with the little part of the brush upstream, so that, as the dam settles, the heavy ends are exposed in a somewhat irregular way, dividing the flow of water into
100 many little channels. The head gates of the Pioneer Canal Company consist of six gates, each five feet wide, set in heavy timber. The water usually flows under these gates with a pressure of from one to three feet. In the winter time, when the call for water is small, they are usually set so as to leave an opening of from three to six inches. In the month of December, 1896, hearing of a search being made for the remains of W. A. Hunter, I examined the head gate and dam very carefully on two different occasions without any results.

Plaintiff offered the answers of W. H. Dennis to cross-interrogatories as follows:

I have lived in Reeves county between five and six years, about eight or ten miles above the bridge across the *bridge of the* Pecos river. I do not know the road to Mentone. I know of two cross-
101 ings or fords on the Pecos river above the bridge at or near Pecos city; do not know whether either of these was ever used in going to Mentone or not. I have seen cowboys crossing cattle on the Pecos river. I never saw cattle run into the Pecos river and get into the quicksand or anything else and sink so rapidly that the cowboys could not save them. If such a thing ever occurred I never saw or heard of it. I heard of one person being drowned in the Pecos river at the rocky ford on the Pecos river about ten miles north of Pecos city. The river there has a solid rock bottom, and I have been informed that the body was found and buried. The current of the river at this point is very swift, and the river was at a very high stage at the time the man was drowned. There is very little material in the bottom of the Pecos river that can strictly be called sand. The bottom of the river is composed of clay and mud chiefly. These clay and mud deposits shift a great deal, and at one time the river is deep over on the right, and the sand shift- *and* filling in there and leave the river deep on the left. I never saw the place where W. A. Hunter is supposed to have lost his life that I know of. I take the observations daily for the United States Government. The balance of my time is chiefly taken up with the canal company's business. I do not know what use the Geological Survey makes of my reports. I make all my observations at the flume of the Pioneer Canal Company. The gauge is set on the suction by laying it out in the river and under the flume, by instruction of Professor Taylor, as an accurate pen to gauge water. There could not have been much change in the river from the 3rd and 4th of December, 1896, and January, 1897, for there was no

serious raise. R. C. Millican has called on me two or three times. In the fall of 1897 I noticed him and Mr. Boothe at the latter's house. Mr. Milliken wanted to know something about the dam across the Pecos river, and as Mr. Boothe had just rebuilt a portion of it, he was very familiar with it. I made one examination of the Pecos river with Mr. Milliken; was not present when surveys was made of the banks last of December of first of January, 1897, shortly after the search was being made for Hunter's body. I only examined the head gate and dam of the canal company, as it was practically impossible for a floating body to pass either one of them. I did not seine the river. I expected to find his body floating on the water. No one ever asked me to make this search.

102 Exhibit attached to deposition as to stages of water to be attached.

I never heard of anybody being drowned at the place where Hunter's wagon was found; have never been at that place that I know of.

J. W. PREWIT testified as follows by deposition taken June 11th, 1898:

Am 56 years of age; reside at Pecos city, Reeves county, Texas, where I have resided for about six years; before moving to Pecos I resided at Crockett, Houston county, Texas; am a farmer and stock-raiser and have been since I moved to Reeves county; do not know W. A. Hunter; once saw a man with Mrs. Mettler whom I learned afterwards was W. A. Hunter. From circumstances I have been enabled to fix the date when I saw Hunter at about December 3rd, 1896; saw him in Pecos, Texas; I know Mrs. Jennie M. Mettler. When I saw Hunter in Pecos about December 3rd, 1896, he was standing near a wagon with two horses hitched thereto; one was a dark-bay or brown horse, 10 or 12 years old and about 15 hands high; the other was a light-bay horse, medium size; did not notice him particularly. I had seen the brown horse before; knew him well; it had been in my possession and in my pasture north of Pecos about twelve miles; was in my possession for about twelve months. I used him while in my possession; rode and worked him; we called him "Ginger;" saw the horse twice on the 3rd of December, 1896; it was at the same place both times; think he belonged at that time to Emerson Powers; saw W. A. Hunter and Mrs. Jennie M. Mettler together on December 3rd, 1896; think it was about 10 or 11 o'clock a. m.; saw them at Heitman's back lot; both were standing near the wagon talking, Hunter in front of the horses; horses were then hitched to the wagon. I used the Emerson Powers horse both as a saddler and work horse; used him in camping out; never had him with me on but one camping trip; was then out about two weeks; this was in 1893 or 1894; went from my ranch on the Pecos river to the Davis mountains, about sixty-five miles south from Pecos; have had considerable experience in camp life in the Pecos country since I came to Reeves county; have hunted and fished and taken several trips to the Davis mountains; I knew the traits and habits

of horses during the time he was in my possession; considered him a good camp horse; never had him to leave camp when loose or unhitched; he was a good camp horse; would al-
103 ways remain at or near the camp when turned loose. George W. Boyer owned the horse when I first knew him; he was next owned by Daggett, then by Emerson Powers. During all the time I knew the horse he was kept on the west side of the Pecos river, except a short time when he was in the possession of B. P. Van Horn. The town of Pecos is on the west side of the Pecos river. I kept the Emerson Powers horse about twelve miles north of Pecos, on the west side of the river; then resided about five miles north of the Pioneer Canal Company's dam, across the Pecos river; do not know of my personal knowledge where the Hunter camping outfit was found, but have known where I have been informed it was, on the opposite side of the Pecos river from my place—that is, on the east bank of the river, my place being on the west. When the Powers horse was kept by Daggett he was kept about seven miles south of my place, on the same side of the river. Powers kept him in and about Pecos city and on same side of the river. This horse was also kept for a while by B. P. Van Horn, at or near Grand Falls, in Ward county, Texas, about forty miles from my place and on the east side of the river.

Plaintiff offered answers of J. W. Prewit to cross-interrogatories propounded by her:

In 1880 I resided in Crockett, Houston county, Texas; removed to Reeves county in 1891, where I have resided ever since; never knew W. A. Hunter; was told that the man whom I saw with Mrs. Mettler on December 3rd, 1896, was her brother and that his name was Hunter; have known Mrs. Jennie M. Mettler by sight since October or November, 1896; was not acquainted with her husband; am acquainted with R. C. Milliken; he told me himself that he was representing a life insurance company; met him at my house about one year ago; have had but one conversation with him since January 1st, 1897; this occurred at my house some time during the month of February or March, this year (1898), the town of Pecos, Reeves county, Texas. Milliken told me that he had examined the Pecos river for the body of Hunter; would not expect to find the body of a man in the Pecos river a month or a month and a half after he had drowned; such an expectation is not a reasonable one. Milliken has never been to see me with reference to taking my depo-
104 sition; he came to see me for a description of the horses that Hunter drove to the wagon from Pecos, more particularly for a description of the brown horse; gave Milliken a written statement in reference to this matter the first time I saw him; he wrote it himself; have no recollection of signing and swearing to the statement; have never seen the statement since it was made. It is true that a horse which has a reputation of standing will sometimes leave or go off when left untied. If the Powers horse had been left tied at the camp and had got loose I do not undertake to say that it would have been strange, improbable, or suspicious for him

to leave camp and undertake to go home; any camp horse is liable to leave camp sometimes.

Whereupon the court adjourned until 10 a. m., Thursday, May 31st, 1900, on which date the court reconvened at the hour named, and PATRICK CARSON testified by deposition taken on the 10th day of June, 1896, as follows:

Am twenty-two years of age; reside in Barstow, Ward county, Texas, and did during December, 1896; was engaged in the drug business, and was also deputy postmaster; I kept my own books; kept nothing but ledger and blotter; books were correctly kept as to charges and entries made therein, both as to goods sold and dates of entries; sold drugs for cash and on credit; entries were made on all credit sales; I made all entries of sales made in December, 1896; entries were first made on the blotter, and all such entries were made at the time the sale was made. I was acquainted with R. H. Kissee and his wife in 1896; they were customers at my store and made purchases both for cash and on credit; sold them medicine during the first week in December, 1896; entries of such sales were made on my books at the time the sales were made. On December 1st, 1896, sold them one package of Simmons' Liver Regulator; on December 5th, 1896, sold them one bottle of Hall's Catarrh Cure; both items were charged to R. H. Kissee on my books. First entries of these sales were made on the blotter. I made the entry and sale of Hall's Catarrh Cure myself, and the article was sold on the 5th of December, 1896; have carefully examined my blotter for the month of December, 1896, and find this to be the only sale of Hall's Catarrh Cure sold to Kissee during December of of that year.

Plaintiff offered answers to cross-interrogatories by PATRICK CARSON, which are as follows:

I am acquainted with R. C. Milliken; do not know what
105 business he was engaged in in 1897; met him first at Barstow, Texas, in January or February of 1897. He at one time paid me one dollar for information concerning entries on my books; he came to Barstow only one time to see me with reference to taking my deposition. I gave him a written statement with reference to this matter, but do not remember when it was given. He wrote the statement himself. I signed it, but I do not think I swore to it; have never seen the statement since I signed it.

Capt. A. D. IRVIN testified by deposition taken June 6th, 1898, as follows:

My age is 58 years.

Reside at Barstow, Ward county, Texas, now and on December 4th, 1896. I was elected sheriff of Reeves county in 1898 and served full term. I saw the large bay or brown horse known as the Emerson Powers horse December 4th, 1896; his condition was not good; horse was standing back of Ed Brady's lot; saw the horse between the hours of 8 and 10 o'clock in the morning. On the morning of December 5th, 1896, the Emerson Powers horse was standing at my

lot. I left on the morning of the 5th and returned two days thereafter and the horse was still standing at my lot, trying to get some corn I had stacked in there. I took the horse across the railroad and left him. I took a piece of rope off of him. The horse is dead; he died in about a week or ten days after the 4th of December, 1896. I went to feed my hogs on a certain day early in December, 1896, and when my son Seth and I reached the Narrows, a place on the Pecos river, about nine miles below Bristow, and we passed a certain place, Seth made the remark, "Just one year ago I camped right there." This is how I come to remember said date. A rope about 12 feet long was on the horse's neck. The rope was free from all dirt; its size was one-half or three-fourths of an inch. I removed the rope from the horse's neck some time between the 5th and 10th of December, 1896, and turned it over to the county clerk of Reeves county and Mr. Milliken; that is the last time I saw it. If the rope had been dragged by said horse for a distance of twelve or fourteen miles I think it would have shown it; it would have been worn slick and smooth. I did notice it, but it did not show
106 being dragged. I have had horses out at doubtless all seasons of the year in the same locality as that in which the Powers horse was. The rope would wear smooth and have no frazzles. It would have been dirty, would have shown the wear, but this rope was not smooth, but rough, and looked like a rope that had been used only about a place or house.

Plaintiff offered the answers to 5th, 7th, and 8th cross-interrogatories to Capt. A. D. Irvin:

I know R. C. Milliken; do not know, but suppose he was a detective. He did not tell me his business. I met him at Barstow in the winter of 1896 or 1897. Mr. J. B. Gibson introduced me to Mr. Milliken. Mr. Gibson is county clerk of Reeves county. Our meetings since then were casual, and have had two or three conversations with Mr. Milliken. Saw him in McCullough's store and he came to my house twice; this was in Bristow; no private conversations have ever occurred between Milliken and myself. I think Mr. McCullough was present at the store and my family was present while he was at my house. I know nothing about the search of the Pecos river for the body of W. A. Hunter. I would not expect to find the body of a man a month and a half after he was drowned in the river; such an expectation is not reasonable. I gave Mr. Milliken a written statement taken before the clerk of this county. I did not write it. Either the clerk or Milliken wrote it. It was typewritten. I signed and swore to it before the clerk; read the statement myself; have never seen it since I signed it; think Mr. Gibson was present when Mr. Milliken first spoke to me in reference to when I saw the Emerson Powers horse back of E. J. Brady's lot. It may have been that I was not certain as to the day until I recollected what my son Seth had said about camping. I do not remember having made any statement about it being the 10th or 14th of December. I do not think that December 4th is wrong. The above statement is true to the best of my knowledge. I do not remember

Mr. Milliken asking me whether it was the 4th of December; we were all trying to remember the date, and I do not remember Mr. Milliken suggesting the date to me. I do not remember Mr. Milliken's statement in reference thereto. When I first saw the horse he was about 100 yards from my place; he was about forty yards from me when I first saw him. I went to the horse and took hold of him. I do not think any one saw me. He was around Brady's and my place four or five days before I took him across
107 the railroad below town. Some time between the 5th and 10th the rope was removed; I removed it; this was before the horse died. I noticed the rope when I took it off. I noticed that it was not dirty or stained when I took it from the horse's neck. Mr. Gibson, Mr. Milliken, and myself were all talking about the rope. I do not know whether it was dragged through mud or not. I haven't been shown the interrogatories propounded to me, either direct or cross. R. W. Thomas was present while the officer was taking my deposition; he was writing the answers to the interrogatories; the answers were not written out before I came to this answer. I have used no memoranda, written or otherwise. Mr. Milliken is in Barstow today; he was not here yesterday, that I know of; only once have I been before said officer to give my deposition.

W. B. Oats testified by deposition taken on the 11th of June, 1898, as follows:

Am 38 years old; reside in Pecos city, Reeves county, Texas, and have since December, 1893. From December, 1893, to March, 1898, was engaged in the livery business; am now working on cattle ranch.

Was slightly acquainted with W. A. Hunter; last saw him at my grain-house, in Pecos, about 10 a. m., on the 2nd or 3rd of December, 1896. About one week prior to December 3rd, 1896, Hunter and Mrs. Mettler took a horse from my stable which had been left there for Mrs. Mettler. Hunter never did put a horse in my stable himself. At the time he took the horse out of the stable I sold him one bale of alfalfa, which I delivered to him at H. H. Heightman house. On the day Hunter left Pecos I sold him three bales of alfalfa; he had a two-horse wagon with him at the time he purchased the hay, which was loaded into the wagon for him. This last purchase of hay by Hunter of me was on the 2nd or 3rd of December, 1896. The horse had been put in my stable for Mrs. Mettler; she was with Hunter when the horse was taken out; it was a medium-sized brown horse; it was sent to the stable from Johnson's range in Winkler or Loving county. Have been working with horses in Reeves county, both winter and summer, for about thirteen years. Horses taken off the range in Reeves county in winter are usually very weak and not fit for a spell of harness. It has been our custom to feed range horses when taken up in winter from eight to ten days before using them. The effect of working a horse
108 which has been running on the winter range depends largely upon the kind of grass upon which the horse has been graz-

ing; if he has been grazing on salt grass he is liable to die if used before feeding him on grain or hay; if he has been grazing on other grasses which grow on the range in this country he is not so liable to die, but is too weak to endure the hardships.

On cross-examination witness testified:

In 1880 I resided in King county, Texas; was engaged in the cattle business then; went from King county to Lipscomb county, then known as "No Man's Land," in 1881; was engaged still in the cattle business from 1881 to 1882 or 1883; was in Archer and Wichita counties in cattle business, then removed to Lotley county and remained there a year or a year and a half; after this came to Reeves county, where I have since resided; had known W. A. Hunter about one week prior to December, 1896; never met him except in one or two business transactions; met him a time or two at my place of business; have known Mrs. Jennie M. Mettler one and a half or two years; didn't know her husband, S. L. Mettler; he never did reside at Pecos. Mrs. Mettler came to Pecos soon after her husband's death. So far as I know, the life of Mrs. Mettler prior to December, 1896, was an honest and moral one. Am acquainted with R. C. Milliken; think I first met him at my stable in Pecos. Since January 1st, 1897, have had numerous conversations with Milliken, but never had but one conversation with him concerning this matter, which was at Johnson & Heard's saloon in Pecos some time in 1897; no one was present at this conversation.

Mrs. E. J. BRADY testified by deposition taken June 8th, 1898, as follows:

I reside in Reeves county, Texas; am 41 years old; December 4th, 1896, I lived in Barstow, Ward county, Texas. I saw the Emerson Powers horse standing looking over my fence into the back yard; the horse was thin and very bad-looking. I saw the horse on Friday, December 4th; it was early in the morning, just after I had gotten up, that I saw the horse. My house is about 150 yards from the Texas and Pacific depot. G. M. Southard's lot was nearest to the depot; no obstruction between it and the depot that I know of; it was about 50 yards from the depot and is on the Grand Falls public road, and no obstruction between the depot
109 and said road. I saw the horse every day until the morning of the 9th of December; he was around my house all the time between the 7th and 9th of December; he followed me when I went to water my horse. The horse was looking very thin and I made inquiries of different people if they knew who he belonged to; he had a piece of rope on him. I was taken sick on the 9th of December and did not see the horse again and did not know what became of him. The reason I can place the date when I first saw the horse is that Mr. Milliken came to see me about the horse and, the occurrence being fresh in my memory, I remember the day of the week that I saw the horse, and I remember distinctly the day of my being sick, and it was on Friday, but I was taken sick on the 9th. I remember this special sickness, because I was very sick for a long time.

Mrs. R. H. KISSEE testified by deposition taken June 13th, 1898, as follows:

I now reside in Pecos, Reeves county, Texas; in December, 1896, I resided at Barstow, Ward county, Texas; am not certain as to the time, but it was some time during the month of December, 1896, at Barstow, Texas. I saw the horse known as or called the Powers horse; never saw the said horse but one time, and then at about twelve o'clock at night; took him to be a medium-sized brown or dark-bay horse; had a short rope tied about and hanging from the neck; cannot give any further description of him; cannot positively fix the time when I saw the horse as being in the month of December, 1896; if it was in December, cannot state what day of the month; there are facts and circumstances which enable me to fix the date on which I first saw the said horse at Barstow; on the day preceding the night on which I saw the horse my brother, C. A. Irvin, came to my father's house at Barstow; he was sick at the time. Mother, being unwell, requested me to remain at the house over night and set up with my brother. At about 12 o'clock during this night my attention was attracted by a noise on the outside; went out to see what caused it; found the horse to which I referred standing on the outside of the lot, eating cane piled on the inside of the lot; thinking it was my brother's horse, went outside to examine him; found him to be the horse above described, which I afterwards learned was the Powers horse; think it was in December, 1896, that my brother, C. A. Irvin, came to my father's house and remained there several days on account of sickness; had rheumatism; also catarrh of the head; purchased a bottle of Hall's catarrh cure for him at Patrick Carson's drug store in Barstow; this purchase was made on the evening before I saw the horse; bought the medicine on a credit and had the same charged to R. H. Kissee.

Mrs. M. H. MANNING testified by deposition taken on June 10th, 1898, as follows:

Am 45 years of age; reside near Pecos, Reeves county, Texas; was residing on Emerson Powers' place near Pecos city on December 2nd, 1896. I know Mrs. Jennie M. Mettler; never met W. A. Hunter but one time. Mr. Hunter and Mrs. Mettler came to my house on the 2nd day of December, 1896; Mrs. Mettler wanted to get one of Mr. Powers' horses to work to Mentone, Loving county, Texas. Mrs. Mettler said on this occasion that Mr. Powers had promised to let her have a horse whenever she wanted it; that she wanted a horse for her brother to work to Mentone; they got a big brown horse, called by us "Brown," hitched him to a wagon while at my home and worked him off. He was a medium-dark-brown horse, broke to work and ride. Hunter did not say for what purpose they wanted the horse; said would want the horse for two or three days. Mrs. Mettler and Mr. Hunter came to my house together.

Miss LULA IRVIN testified by deposition taken on June 7th, 1898, as follows:

Am nineteen years of age and reside at Barstow, Ward county, Texas, and did in December, 1896. I saw the large bay or brown horse which W. A. Hunter left Pecos, Texas, with on December 3rd, 1896, but do not know whether it was known as the Emerson Powers horse; the horse was very poor; saw it at Mr. E. J. Brady's lot in Barstow, Texas, on Friday, December 4th, 1896; the said lot is about two hundred yards from the Texas & Pacific depot. G. M. Southard's lot is nearest to the depot; no obstruction between said lot and depot. I think I saw the horse during the afternoon about 2 or 3 o'clock, about 100 yards distant; the said lot is on the public road, the Grand Falls road, and no obstruction between it and the road. I saw the horse again on Saturday at our place and I think he stayed until Monday, when papa (A. D. Irvin) led him down the ditch. I fixed the date when the horse was first seen by me in Barstow by the circumstances of getting medicine at Pat Carson's
111 and by my brother Seth stating that he spent last night at the same place that he had spent the same night of December 5th, 1895.

JNO. SCHWARTS, being duly sworn in behalf of defendant, testified:

I reside at Fort Worth, Texas, and have about six or seven years; am acquainted with Mrs. Mettler, the plaintiff; have known her about 15 years. I know W. A. Hunter; have known him about the same length of time; I knew him at Fort Worth, Texas; was once in my employment; assisted in waiting on customers; I think it was in the year 1896; he came to Fort Worth the first part of the summer and stayed there during the summer; do not know what month he left; think he was there about three months; I was well acquainted with Hunter; he boarded at three or four different places; roomed at the gallery, my place of business; I last saw him late in the fall, either November or December; he was there in Fort Worth; came to Dallas after he left Fort Worth and was there a few days.

Witness was asked whether Hunter had a valise of any character; if so, describe it: He had a small hand grip about like that, as well as I remember (pointing to a small hand grip on the table); it was a dark tan color. Think he left my employ in July or August; he came to Dallas after he left Fort Worth; he was here several months before he went West, I suppose.

On cross-examination witness testified:

I slept at the gallery part of the time; have known Hunter about fifteen years; first met him at Fort Worth; was in my employ part of the time, two or three months in the summer; he was not getting much salary; he was unemployed and making his expenses; I think, as well as I remember, he had a grip something like that pointed out. I don't remember his having a large grip; one of those cloth grips that slip up and down—telescope. I do not undertake to say he did not have one; I don't remember whether he had one or not.

On redirect examination witness said:

I never saw any other valise owned or claimed by Hunter than the one I have described.

Mrs. J. B. MILLER, being sworn on behalf of defendant, testified as follows:

112 I reside in Fort Worth and have since the 1st of last March; prior to coming to Fort Worth I lived in Pecos about seven years and there made the acquaintance of Mrs. Jennie M. Mettler and Mr. W. A. Hunter. I had known Mrs. Mettler a year, I guess, and only knew Mr. Hunter a few months; he stopped at our hotel a few times; we were in the hotel business. I remember Mr. Hunter being in the hotel about the 1st of December, 1896; he came in there on the night train about 12 or 2 o'clock; the next morning he settled his bill and said he was going to visit his sister; he came back in a little while in a wagon and got his grip and overcoat and said he was going out to Mentone. I observed that he had a bed in the wagon and had what appeared to be a camp outfit. I did not notice particularly; am sure I saw some bed quilts, blankets, etc.; do not remember that I saw a stove; he got his overcoat and grip; the grip was something the size of that (pointing to the same hand grip designated by witness John Schwartz), which is about 15 inches long, 8 inches high, and five inches wide; it was a shoulder-strap grip, a plain red grip, as I remember it; he took his grip and overcoat and put it across his shoulder and got in the wagon; he went towards the depot from our house. I think that is east; it was his direction to Mentone; that is the way he told me he was going.

On cross-examination witness testified:

Mr. Hunter left our hotel with the wagon, as well as I remember, about ten o'clock; that was the next morning after he come in at night, as well as I remember. I did not go out to the wagon and did not make any examination at all and only testify from a casual observation of the wagon; the bedding is the only thing I noticed particularly.

A. M. RANDOLPH, being sworn on behalf of defendant, testified as follows:

I reside at Pecos city, Texas, and have for nearly thirteen years; am county surveyor and have been for twelve years; am a surveyor and engineer. I have made a map and a photograph of the bank of the Pecos river where it is alleged Mr. Hunter made his disappearance. (The map is here shown witness and he identifies it as the one made by him.)

In explanation of the manner in which the mapping was made and how he arrived at a photograph of the bank, witness said
113 he used a rod and tape-line and measured the different heights and distances as indicated on the map, and that it represented a true photograph of the bank as found by the witness at the time he made the measurements.

I have been to the place where the accident is supposed to have

occurred three times. I only know that I visited the exact spot from the testimony of others; went there the first time about a year ago, which was in 1899, 10th of May, and in April, 1900. Mr. Milliken pointed out the place I visited as the one where it is alleged Hunter was drowned. He employed me to go on the first trip, and also had me to go on the second. The first time I went to said point Mr. Milliken, Mr. Slack, and Mr. Estes were with me.

Mr. H. C. Slack was here introduced, and identified the point which was pointed out to the witness A. M. Randolph as the correct one where the camping outfit of Mr. Hunter was located, and the exact place where Mr. Hunter is supposed to have got into the river, and stated that as the exact point so pointed out to Mr. Randolph at the time of their visit; whereupon Mr. RANDOLPH was recalled and further testified as follows:

The map drawn by me is a true photograph of the bank where it is supposed Mr. Hunter fell in.

The map is here introduced, and the entries, distances, measurements, and locations testified. The different articles testified to are indicated in the purported note on the map, and are self-explanatory.

Witness further testified that he had lived on the Pecos river about thirteen years, and was well acquainted with the nature and character of the stream; that the duties of his office did not require him to know anything more about the stream than in land surveying and running lines along the stream. I have crossed the stream many times at different places, and never had any difficulty in making a crossing. I have crossed it in the daytime and in the dark on horseback. At two of the places I crossed it had fords, and the other places were just wherever I happened to strike the river and I could get down on the bank and up on the opposite side. I do not think there is any danger in crossing the stream. I know nothing of the velocity of the stream except by measurement with floats, using floats in the current. I have had occasion to make investigation of the velocity of the stream in the vicinity of where Hunter is supposed to have fallen in. The stream runs
114 northwest and southeast at said point; it is straight for some considerable distance; I should think about six or seven hundred feet it would be almost perfectly straight. I measured along on the bank with a tape-line, parallel with the current, $\frac{1}{16}$ of a mile, and at a point where I can put in a float and time it to the end of this measurement; that disclosed the current to be two miles in sixty-four minutes by that measurement—the condition of the stream was what we call low; not as low as it does get. The stream was falling on the day on which I made the measurement; horses were ridden into the river, being the point where Hunter is supposed to have fallen in; they were ridden in about fifteen yards above. I did not notice the depth of the water nor how high it came upon the horses at the time, but noticed afterwards that they were wet about half up their sides. The horses crossed the stream; there was no ford anywhere along there.

(Witness was handed three photographs, and, upon examination, said that he remembered one, and that he was acquainted with the parties whose photographs were taken thereon.)

Mr. R. C. Milliken took the photographs at the time we made the measurement on the bank May 10, 1899. Witness identified the photographs marked Exhibits.

On cross-examination witness said:

I have attended court at Dallas twice before this. I made the map offered in evidence May, 1899; was employed by R. C. Milliken. The map is a correct map of the river at the point that was pointed out to me at the time I made it, in May, 1899. I do not pretend that this is a correct map of the river in 1896. I am fairly familiar with the current of the river; cannot say that it frequently changes. It is true that during a rise the current of the river frequently throws up sand beds; that on this side of the river there is no sand bed, and in two or three weeks or a month there is a sand bed there. When the rise falls it leaves the sand bed. I do not think it is true that the river is known as a quicksand river; do not think there is quicksand in it; never heard of any cows being stuck up in the quicksand. I quit work for the T. & P. a year or two ago—I think a year ago this past March. My connection was severed with the T. & P. and my employment ended because it was contended that I did not turn over funds collected. The Pecos river runs
115 through a country where there is a great deal of sand in the river valley. The Pecos river has steep banks; it is noted for that.

On redirect examination the witness said:

I have a fairly good judgment of distances, and, in my judgment, the average width of the Pecos river would not exceed one hundred feet. At the time I made the measurements on the bank of the river I saw no signs of any recent change in the bank, and when I was again there, in April of this year, I noticed no signs of any change since I had been there in May of the year 1899; it looked about the same way. I was on the opposite side from which the survey was made. I made some measurements from this point to the Pioneer Canal dam. The distance from the point where the measurement of the bank were taken and the point where it is alleged Hunter fell in the river, by the meanderings of the river, to the dam, is $4\frac{7}{10}$ miles; straight through it is $3\frac{7}{10}$. I made a plat of it.

On recross-examination witness said:

The river is not perfectly straight from the point where I made the measurement to the dam; it is winding. When I made the measurement between the two points I had two Mexicans and my son with me. Along the Pecos river there is brush in places pretty thick; not much trouble to get along to a person on foot from the camp down to the dam. The thicket is not thick enough to give a footman trouble. In making the measurement I did not go around all the bends nor into all the bends. My survey shows the distance around the meanderings at $4\frac{7}{10}$ miles, but I did not measure the dis-

tance by going around the bends and following the meanderings of the river. I made the measurement in the same way that I would make it if I were making a survey of land, but that is not an accurate measurement, and the distance of $4\frac{7}{10}$ miles would not be the distance if the meanderings of the river bank were closely followed. I had a conversation with J. B. Gibson, county clerk at Pecos, after I had been up the river and made this survey. I did not tell him that by following the meanderings of the river it was all the way from 10 to 12 miles, but stated to him what I have stated here that the distance was $4\frac{7}{10}$ miles. He said that he did not think it was correct and that he was going to write to you (speaking to the at-
116 torney conducting the cross-examination) and have a survey made. I did not say it was all the way from 10 to 12 miles; only said that I made a survey of $4\frac{7}{10}$ miles. I cannot tell how near I followed the meanderings. I followed it as we usually follow the meanderings in making a land survey, and the survey would be substantially correct without following all the little crooks and turns of the river. I showed Mr. Gibson on the county map how the survey was made.

On redirect examination witness said:

The survey was made as a land survey would be which is not exact, but the excess by reason of the crooks is very small. Surveyors guess at the meanderings of a river. The river is very crooked.

D. H. Scott, for defendant, being sworn, testified as follows:

I reside in Dallas, and am a photographer by occupation and have been about eighteen years. (Witness was then handed a lot of photographs or films, and said that he had developed them; that Mr. Milliken gave him the films; that the development of a film gives a true representation of the object as it was taken by the camera as nearly as possible in photography; that the least light on a film and the least thing touching it would destroy it at any time between the taking and the time it was developed.)

On cross-examination witness said:

Photography cannot be deceptive in developing; you can handle your camera in such a way that an object will look almost any way you want it; you can do so to no great extent in taking a picture; the perspective has a great deal to do with it.

Q. Suppose I was to stand up with a fish in my hand and stand back behind it with the fish held out in front of me, what would be the relative sizes of the man and the fish? The fish would be larger and look to be about as long as I am?

A. No, sir.

Q. Can you make a fish look as large as a man?

A. Yes; if you hold it far enough away. I do not think you can take an object so as to pervert its real looks; cannot pervert its real size to any great extent. You can make a white man look
117 like a negro, but that is done after the picture is taken and is done by light, and is done by toning and holding back the light so as to make the negative look darker. You can pervert an object in that way; it is not done in developing.

Q. Suppose you stood here and took that white wall, would it look like it was at an angle or straight?

A. That would depend on a proper elevation of the camera.

Q. It will depend on the handling of the camera?

A. No, sir; not in these small cameras.

Q. If you take that wall with an ordinary kodak would the wall look straight or look like it was at an angle?

A. No, sir; it depends on where you hold your camera. I can hold the camera and pervert it and make it look different from what it is in the plate.

Q. Not in the bank?

A. No, sir; there is too much difference to make any great change in that; in that you are too close.

Q. Can you pervert the bank as well as you can the building?

A. That would depend on how close you were to it; you could alter it to some extent.

Q. You can make a bank look like it has brush on it when there is none on it?

A. No, sir; and you cannot handle your developement in such a way as to do that.

A. In making alterations of a picture, such as by handling your brush in such a way as to take wrinkles and beard off a man's face in a picture, that is done after the negative has been developed; you can make an object look six inches longer than it is in the prospective.

On redirect examination he said:

You can do this when the object is close, but it has to be very close; it cannot be done with an ordinary little snap-shot at close quarters; anything in the distance cannot be done in that way; it is true that a camera within its range takes an object correct where the objects are the same relative distance; if one is beyond the other, the furtherest would be smaller in proportion to the distance; these changes I have spoken of are made by changing the position
118 of the article photographed. Taking these photographs and as a scientific man as to the true representation of the matters they purport to represent, I consider them correct. I developed them correctly. I did not do anything to torture them in developing.

On recross-examination witness said:

If one or two objects is a little behind the other, they would not appear to be side by side. If you show the surface they were standing on, it would show the distance.

R. S. Johnson, being sworn in on part of defendant, testified as follows:

I am the R. S. Johnson spoken of by Messrs. Gibson and Mettler as being one of the persons who went up to investigate Hunter's disappearance. I went on the 29th of December, 1896. I investigated the place at the camp.

(Here photographs were handed to the witness, and witness rec-

ognized himself as one of the parties photographed and said it was taken right on the spot where Hunter is supposed to have gone into the river. Witness also recognized Mr. Henry Slack at the point where the root or limb went into the bank.)

(Question by COURT:) Is that a true picture?
A. Yes, sir.

Witness then identified photograph taken when he was not there and identified the witness, J. B. Gibson, and Henry Slack.

On cross-examination witness testified:

These photographs were taken on May 29, 1898. Mr. Milliken, Henry Slack, and Mr. Tulk were with me at the time. Mr. Milliken operated the kodak. When the picture was taken he was standing out in the river is my recollection.

Witness then drew the course of the river on a piece of paper and marked the points of the compass thereon.

Mr. Milliken did not cross the river when he took the photograph which I have identified. The river at that point is about 87 feet wide *feet wide*, and he stood out in the water about twenty feet from where we were when he took the pictures and in the water probably eight or ten feet from the bank. He waded out in the water and stood on the bed of the river. I think he took his pants off.
119 He took the photigraph angling, about twenty feet distant. He did not take it on a line parallel with the bank. The bank is principally straight at that point, up and down, as shown by the map handed the witness. (Witness designates that point where all the parties were sitting, as shown in the photographs, and shows where the straight bank is.) I do not think it is four or five feet high; I do not think it over two and a half feet high, and it was right in the straight part of the bank—of this two and a half feet bank—right under Mr. Slack's feet. The crook in the river as shown in the photograph is about 150 yards above, nearly 200 yards from where we sat. That is a correct picture of that bank as it was. (Pictures marked "A 1," "A 2," and "A 3" were admitted in evidence.)

LEE JOHNSON, for the defendant, being *shown*, testified as follows:

I reside at Fort Worth; have lived at Pecos; lived there from 1885 to 1897; was merchandising the first year, and then I was in the cattle business. I have a ranch, and have had for a number of years, in Reeves county, Texas; am acquainted with the physical character of the Pecos river. At times it is very boggy, and at other times it is not. I have known many thousands of cattle to be bogged in the river at different times. Except at a few places, the river is not boggy except when it is low. As a rule, it is not boggy when it is low. It is boggy during and after a rise. It is the same all along, including the place where it is supposed Hunter met his accident. It is frequently so that cattle get into bogs and are unable to get out; the only way they can be got out is for the boys to strip and go in there and tromp them out. That is done by constantly walking around the body until you push the sand below the animal

and drag it out. When a human being goes in to tromp the sand it has no effect on him.

On cross-examination witness said:

I suppose the temperature of the Pecos river would be colder in the winter. One substance sinks in the quicksand like other bodies under similar conditions. My explanation of why a cow will sink in the sand and cannot extricate itself and a human being does not so sink is the weight of the body and the amount of surface on the sand.

H. B. TAYLOR, sworn for defendant, testified as follows:

I live in Dallas; resided part of one summer in Reeves
120 county and part in Loving county; knew W. A. Hunter; got acquainted with him in the Panhandle at Quanah about 1890 or 1891; do not think he could swim; have seen him try; think he came out there in the fall of 1893.

On cross-examination witness sa-d:

Hunter was not in Loving county or at Pecos at the time of the original organization of the county. He was there at Quanah or Denison then; cannot say exactly when he came after the organization, but think it was in the fall. I am somewhat familiar with the Pecos river; went in it parts of two years. I consider it a dangerous river at times. I do not feel that my acquaintance with the river is sufficient for me to testify as to its condition, etc. I think it is boggy, and consider it dangerous on that account. I think it carries a great deal of sand all the time when it is *is* up. The water is full of sand pretty much all the time, I think; sufficient to color it some.

D. G. WALLACE, witness for defendant, testified by deposition taken *de bene esse* as follows:

On direct examination:

I was born in Ireland; came to this country when about six or seven years old; I think in 1854 or 1855; landed in New York, and went from there to Pittsburg when about seven years old, then went to Cincinnati and resided there a short while; from there to Newark, Ohio, and lived there between twenty-five and thirty years; from Newark, Ohio, I came here to Nashville, Tennessee; have been here nearly nine years; my age is 53 years; am working for P. F. Collier, of New York, selling books, and have been since coming to Nashville; sold books for them a year or so before coming to Nashville; while I lived at Newark, Ohio, I sold dry goods there for several years until the parties made an assignment and went out of business. I afterwards worked for different parties. I worked for the Newark Advocate Printing Company and the American Printing Company. The Advocate Company was in the business of printing papers and paper-book binding business. The firm was engaged in doing job work and printing a daily and weekly paper. While residing there I knew brothers of the Hunter family that lived in Homer, Ohio. It has been a long time since I saw any of them. I solicited for this paper (the Advocate) through the

country; solicited the houses to take the weekly paper.
121 It has been about 12 or 13 years since then; in January of 1897 I met one of the Mr. Hunters, formerly of Homer, Ohio, in this city; I met him in Flourishe's cigar store, corner of Church and Summer streets; while I was in there I saw a stranger in there, he looked like a stranger to me, and I says to him, "I see you are a stranger in this city," and he says, "Yes," and I said, "Where are you from?" and he said, "I am a sheriff, from Texas," and he says, "Where are you from?" and I says, "From Newark, Ohio," and he says, "I am from Homer, Ohio," and I says, "What is your name?" and he says, "William Hunter," and I says, "I know your family well," and we shook hands and were glad to see each other; we were from the same county. Well, while we were talking he says, "I know your brother in Newark, Ohio; kept a dry-goods store; I expect they have sold me plenty of goods," and I said, "I expect I have sold your folks goods," and he says, "Yes, no doubt you have," and he says, "I have a notion to go into business," and I says, "What kind of business are you going into?" and he says, "The real-estate business," and I says, "That is a very good business here," and then he says, "I would like for you to come down to see me at my boarding-house," and I did not ask where his boarding-house was or anything like that, and the conversation dropped there finally. (Witness was here shown a photograph that was marked on the back of it "Exhibit E, Buford Duke, R. Stebottom, and R. A. Henry," with other pictures.) He was asked to state which of these pictures, if *there*, is a picture of the man that witness talked with in January, 1897, in Flourishe's store; to which he answered that the one with a paper in his hand, reading, on the left-hand side; witness stated that he first saw this picture at the police station in Nashville, a couple of months before his deposition was taken, among some twenty-odd other pictures which were exhibited to him with this one, and that he picked out the one marked as "Exhibit E," aforesaid, as the picture of the man with whom he talked and has just been identified by him. At the time of the conversation with Mr. Hunter in Flourishe's store witness was a subscriber for a paper published in Newark, Ohio (the Newark Advocate). After seeing Mr. Hunter in the cigar store he saw a notice about him shortly thereafter in the Newark paper, which notice stated that a sheriff from Texas was drowned, and they had found one of his horses frozen to death, and they found another feeding the same place; that it could not have been more—
122 three or four days after he met Mr. Hunter in the cigar store until he saw that notice in the Newark paper; that he mentioned the fact of seeing this notice in the paper and of having seen Mr. Hunter a few days before to his sister-in-law and her family; also mentioned it to Mr. Turner, who is now dead, and Mr. Flourish, the cigar man, and I wrote to the Advocate Printing Company; I did it from courtesy to his family to let them know that he was drowned, but that I shook hands with him on the corner of Church and Summer; I thought the family would feel better to let them know he was living; I did not have any other purpose than for the

family's sake; I afterwards saw a notice in the paper acknowledging receipt of my letter, but the paper did not state correctly where I had seen the man; it said in a street car and I did not meet him in a street car, I met him in a store; I did not say anything about a street car in the letter at all; I did not preserve a copy of the letter I wrote to the Advocate and I did not preserve a copy of the Daily Advocate; I left it at home and think burned it up or used it after reading the home news. After I sent this notification to the Newark Advocate I got a letter from a relative of Mr. Hunter; I think it must have been a brother-in-law; I do not remember his name; I did not keep this letter and do not know where it is. I very seldom keep letters, generally burn them up; it asked me to give a description of the man and I gave it to them as far as I could, but after then I never heard any more about it. They asked me for a description of the man I saw in Flourishe's store; I did not get any reply to my letter; in that account published in the paper at Newark giving the death of Mr. Hunter they gave his at a time prior to the time that I saw him in Flourishe's store. I am in no way connected with the Fidelity Mutual Life Association of Philadelphia; I do not know Mr. Milliken; never saw him at all. I never saw Mr. R. A. Henry, of this city, only when he called on me; I did not know him at the time I saw Mr. Hunter in the cigar store here; after that I went away and was in Alabama; when I came home my niece says, "There is a card laying here for you; some man named Henry," and I says, "What on earth does Henry want with me? I don't know that man;" I says, "I will go up town and see." I saw he had his office in the Homestead building and I went up and asked him his business—what he wanted with me; that was a long time after I had written the letter to the Advocate. Let's see, I was in Alabama, I think, in August or September; I do not
123 know which it was when I came home from there; it was August or September of 1898, I don't know which; I know it was pretty hot down there in that country selling books.

On cross-examination:

Witness was asked, What did he have to say to you when you met him?

A. It is natural, you know, for — travelling men when he sees strangers to ask where they are from.

Q. The man Mr. Henry?

A. He just asked me about this man. Henry wanted to know where I had met him, this man, and just asked me about the case; asked me, well, just about the same repetition that Mr. Stokes asked me. I can tell you just the same and repeat it to you if you wish. (Witness was then made to repeat the conversation between himself and Mr. R. A. Henry, which was as above detailed on the witness stand, and added:) That he went home and I says to my sister-in-law, "I met a man from Licking county," and she says, "I am glad to hear it; glad to meet somebody from home." I saw him (Henry) two or three days after that, and I got the paper from home that said Mr. Hunter had been drownded, from Texas, and we both laughed over it; that is the same man that I shook hands with in

Flourishe's store, and told him then that I put the notice in the paper, through courtesy to the family, to let them know, because I knew the Advocate would put it in the Weekly here, so they would see he was not drownded. After I got that paper from Newark I went and showed it to Mr. Turner; he is dead now. This is the Detective Turner, and I said to Mr. Turner, "I believe there is something crooked about this man. I saw in the paper this man was drownded," and I says, "I shook hands with that man in Flourishe's store, corner of Church and Summer streets," and he says he has not got time, for me to look him up and see if I could see this man, and I could not see him, of course. I looked around and could not see him; that is Detective Turner; that conversation was after the notice I sent in to the paper about him being drownded. I thought that it would probably be a case for the detectives here to look up. I had had no previous acquaintance with Mr. Turner; knew him by sight; had been introduced to him, to several detectives here, of course. I belong to several lodges, and a good many of them belong to the same ones I do—to the Royal Arcanum—and Mr. Turner was a Royal Arcanum man, and both of us got acquainted with one another. Just as soon as I got the news-
124 paper that I spoke of I spoke to Mr. Turner. Just as soon as I got the paper I told my sister-in-law, says I, "I am going up to town and take this paper with me," but I did not mention to her that I was going to show it to him.

Q. What was the crime of which you believed Mr. Hunter had been guilty?

A. Well, I didn't know but what there might be some crooked work in it, after shaking hands with a man in a store, and his name is Wm. Hunter, from Homer, Ohio. I didn't know anything about this question being in there. I was as innocent as a child. I didn't know anything about that.

Q. But immediately after you got the paper from Ohio you believed that man had been guilty of some crime and considered it your duty to inform the police?

A. Well, if he was in the city of Nashville at that time, and I thought probably that if he had committed anything wrong, they could look him up. I did not know but what that was my duty. Nobody was present when I had this talk with Mr. Turner. He was at his desk, not feeling well, and has died recently. I put the notice in the Ohio paper through courtesy to his family, because it was a very nice family of people, too. Their standing in Ohio is very good. I do not know the standing of the man Hunter. He had a nice father and mother while I was living there. There was nothing in his family connection that aroused my suspicion or made me think he had been guilty of something crooked or some crime that the interest of justice required that I should at once report to the police. The family stood as high*ly* as any family in that community at that time when I was there.

Q. And you had never heard anything contradictory about him—was not he as good as any of his family?

A. I could not tell you anything about it. I know his father and

mother well; do not know his father's name. He was a man about very nearly six feet high—a heavy-set man when I saw him. You go back fifteen or sixteen years, and go back and look at a man, and it is hard to describe a man, Mr. Marks. I could not tell you what sort of a beard his father wore. He was a farmer; could not tell you what sort of nose he had; could not describe a single characteristic his father had, because I was not mixed any with
125 his family; was not with them enough to notice that; do not know that I saw him but two or three times in my travels through the country. When I worked for the Advocate Printing Company I solicited the weekly paper for them; I can only remember that he was a heavy-set man, nearly six feet tall; think his wife was living when I knew him, but would not be certain; I think I seen both of them in my time; could not exactly tell you what sort of a looking lady his wife was; do not remember exactly; I guess she was acquainted with me; everybody knew me in that county; I could not tell you who was in the family besides the father and mother.

Q. And cannot state a single fact relating to any one of them?

A. No, sir; I only knew he gave me his name as Wm. Hunter, from Homer, Ohio, and could not say there is any other Wm. Hunter in Ohio. I could not tell you the name of the other Hunters, nor any single one of them nor his father's name; they lived about 18 or 20 miles from where I did in the same county, Licking county; Homer is in Licking county; I am not acquainted with any other fact connected with the Hunter family, their identity, or description of any one of them, or the names of them; know absolutely nothing about them except that there was a man by the name of Hunter who lived in Homer, and he gave me his name as William Hunter; and that in the family I knew the old gentleman I knew was heavy-set and pretty near six feet tall and had a wife and a farm at the time I knew him; am not able to state any other fact or incident in connection with the family; I lived then 18 or 20 miles from where the Hunter family lived about 30 years. I was not a partner but a clerk in the dry-goods business at Newark; clerked for my brother; had two brothers in the dry-goods business; I had three brothers in the dry-goods business there and I clerked for each of them at different times; I never was involved in any litigation growing out of the business; there never was any litigation that I know of; while at work for the paper, the Advocate, I solicited for it; I was the only Republican on the paper; it was a very strong Democratic paper and I was just the other way, and they had me soliciting for the weekly papers through the counties among the Republicans; I think I solicited for this paper six or seven years; I do not quite remember now what year it was I moved to Nashville; moved here for my wife's health, I think, in February, 1890; my wife died here; I did not work on the paper in the capacity of a reporter; solicited subscribers
126 and also worked on the American and on the weekly and on the daily; that was a Republican paper. I do not know as I had left Newark for good; that is my home; it had been there

for years, and I got a brother there. Well, our family is all scattered; one brother in Newark, one in California, one in Chicago, and myself here. I am like the wandering Jew, Mr. Marks, I have no home now; I voted once here in Nashville two or three years ago; I will vote this time. I voted for another Republican candidate for governor except Tillman; in another election I voted here for President—for McKinley; saw Mr. Hunter in January, 1897. I do not know what the election was, two months before I claim to have seen Mr. Hunter. I never pay any attention to these things at all. I only voted twice here for governor and for Pesident; did not at that time have any intention of returning to Newark to live; the only time I have gone back to Newark was when I buried my wife; could not tell you when Mr. Flourish changed his business from Cherry street and went to the corner of Church and Summer. He was on that corner when I saw him in January, 1897; that is where I saw this man that claimed to be Wm. Hunter. He was in the store when I went in, standing on that side of the house next to the cigar case. I was on the other side; no one was with Hunter or talking to him. I went in and bought some tobacco; had only been there a few minutes before any words passed between Hunter and me; there may have been others in the store, but I do not know that there was anybody. I noticed he was a stranger; he looked like it to me. I could not tell you how many people live in Nashville; do not know that the official census of 1890 shows it to have had 76,000 population; could not tell how many of that number I know; am not acquainted with as many as five hundred. I do not know what there was about the appearance of that man that enabled me to know that he was not a citizen of Nashville. I just seen that he was a stranger and that is all, and went up and spoke to him; it is natural for us to do that; he said he was a sheriff in Texas, but did not tell me what county. I did not recognize him as Wm. Hunter, from Homer, Licking county, Ohio, at the time we spoke, and did not recognize anything of the Hunter family in his face at all; he was a perfect stranger to me; he left the store first; never saw him after that, but tried to shortly after I got that paper; I thought I might meet him on the street again. I did not want to see him for anything particular, just wanted
127 to see him and have a talk with him, that is all. He did not say anything about having any insurance on his life. I do not know anything about it, and do not know anything about his affairs. I notified Turner what I saw in the paper; took the paper and showed it to him, and he read it. It was two or three days after I saw this paper that I decided to write the letter to the Newark paper, the Advocate Printing Company. I wrote it after I had seen Mr. Turner, from kind motives and nothing else, sir.

Q. After you had put the detective on the search for the missing party you suspected of crooked work?

A. I had put him on the search. I thought probably there might be a little crooked work, a man being drownded, and I saw him and shook hands with him. I thought maybe there might be something crooked in it, that is all. I saw Mr. Henry, the agent of the insur-

ance company, two or three times; was invited to come to his office. Up in Hopkinsville last month I talked with another agent of the insurance company, just mentioned that about a man trying to beat the company, that is all. I was talking with him; was well acquainted with him; was trying to sell him some books, and told him that a man in Texas was trying to get the best of the company; that I had seen the man and shook hands with him. I never talked with any other agent of the insurance company than these two. In my letter to the Advocate I did not write as follows:

"The Mr. William Hunter referred to is not dead, as I met him and shook hands with him on a street car in Nashville on January 22. Mr. Hunter's father lives in Homer, Ohio." The clipping from the newspaper was shown the witness and filed as "Exhibit 1" to his deposition, and headed "Hunter is alive," and is as follows, to wit:

"Mr. D. G. Wallace says he met him at Nashville, Tennessee, ten days ago. On January 8th the Advocate published an article credited to the Utica paper, saying that word had been received by Addison Hunter, at Homer, this county, of the disappearance and probable death of his son William in Texas. The notice said that young Wm. Hunter had for two weeks been missing from the town in which he lived. His sister became alarmed and notified friends and sent a party in search of him. Mr. Hunter, recently elected sheriff, had left the Texas town on official business, but his prolonged absence could be accounted for.

128 "After going quite a distance," said the notice, "a company discovered Hunter's wagon containing gun and other belongings; nearby, tied to a tree, lay the dead body of one of his horses, starved to death. The other animal was feeding at no great distance. No trace of Hunter was found, and it was supposed that he had gone to a steep bank of the river, and, while trying to dip water with a bucket and rope, fell in; he was swept away.

"Mr. D. G. Wallace, formerly of this city, now living at Nashville, Tenn., read in the Advocate the above quotation from the Utica paper; Mr. Wallace says in a letter just received: 'Mr. William Hunter, referred to, is not dead, as I met him and shook hands with him on a street car in Nashville on January 22. Mr. Hunter's father lives in Homer, Ohio.'"

Witness was asked to say whether or not the above was the notice that appeared in the Advocate after he wrote them that letter; he answered, "Well, that part was not in it at all—where I met him there was not in the paper at all when I got it. I mean the letter that I wrote them was not in the Advocate; what I wrote the Advocate about meeting this man was not in it then that I saw. I got the paper regularly, but that was not in that piece there, that is all there; that was afterwards; it was several days after I wrote the letter before this was published." Witness said, "I did not see this party, I saw that party." (The deposition fails to designate the parties referred to.)

Q. How did you learn, if you never saw this, that the newpaper had published it, that you had seen Hunter in a street car?

A. They must have seen it in the paper. I wrote them and told them that I had seen a notice in the paper that Wm. Hunter, a sheriff of Texas, was drownded, and that I shook hands with Mr. Wm. Hunter, of Homer, Ohio, on the corner of Church and Summer streets, in a store, and signed my name; those words about meeting him in a street car was not in my letter. I did not shake hands in a street car. I never saw this article until today—this clipping or the paper in which this article was published. I saw the paper from home in which it first told about him being found and his horses; there was quite a little piece. It was about Wm. Hunter, formerly of Ohio, sheriff of Texas, drownded, and one of the horses was found frozen to death and the other wandered off; that was the only newspaper notice I seen that was from Newark; after-
129 wards I saw one saying that I had met him on the street cars after his disappearance; the substance of that notice was as you have there: "D. G. Wallace, formerly of Newark, now of Nashville, Tenn., shook hands with Wm. Hunter on a street car," and I made the remark to my sister-in-law, I says, "That is a mistake; I did not see him on a street car; I saw him in a store;" that was two or three days after I wrote the letter; I could not tell you for certain. Witness said he would not recognize the photograph of any member of the family except William Hunter, and he first saw that at the police station a couple of months ago, with about 15 or 20 photographs, and I picked out that man on the left as Wm. Hunter. He was nearly six feet high, a little stooped, spare built, wore a black hat and a black suit; did not notice what kind of rings or shoes he wore; had a black overcoat; first said that — had a black moustache, then that it was dark and he called it black; did not notice the color of his hair; did not see his hair very well, as he had his hat on; had a medium chin; do not think it was retreating. He did not have a real black moustache; it was not a light one; could not tell what sort of nose he had nor the color of his eyes.

Witness was shown photograph marked "Exhibit 2" to his deposition, and stated that he could not say whether it was a photograph of Wm. Hunter, whom he saw in the cigar store in January, 1897. He was shown photograph marked "Exhibit 3," and asked if that was a photograph of the man he saw, and said, "No, sir; that man is a side view; the other was a plainer face and I could see better." Witness said that "Exhibit 4" was not a photograph of the man he saw, and the same of Nos. 5, 6, 7, and 8. I am only sure of one of the photographs; none of these you showed me at all are photographs of the man I saw that day. I do not know whether he is amongst the photographs you have shown me or not. That is the one I saw (referring to the photograph marked "Exhibit A," on direct examination.) I could not see so well about the man at the table with a pen in his hand Going back to the newspaper notices, witness said that he only saw one notice about this matter, and that was the notice which said that Wm. Hunter was supposed to be drowned, and told about his horses being found that way, and that notice led him to write to the Advocate of the fact of his having seen

him here in Nashville. On being again asked how he
130 learned that the Ohio paper stated that the witness had seen Mr. Hunter on a street car in Nashville, he said, "Well, they just read that letter of mine wrong, that is all." I afterwards saw this other in the newspaper, the part that states that I saw him in a street car in Nashville and shook hands with him, and that is the second notice that I spoke of reading just a few days after I had written the letter. There was only one such notice that I saw.

On redirect examination witness said:

I saw one notice in the paper containing an account of Hunter's death and then wrote a note to the Advocate; after that I saw another notice in the paper that I wrote them. In this second notice they have me quoted as saying that I shook hands with Mr. Hunter on a street car in Nashville. I did not write that, but that I met him in a store on the corner of Church and Summer streets.

J. A. Floerish, witness for defendant, being duly sworn, testified by deposition taken *de bene esse* as follows:

In January, 1897, I was in the cigar and tobacco business at # 430 Church street, corner of Sumner, Nashville, Tennessee; was only acquainted with D. G. Wallace as a customer who would be in and out. I never knew who or what his name was until this business came up. I met him ever- day like many other customers; he was in my store almost every day when he was in the city. I remember his having a conversation with some man who appeared to be a stranger, but do not remember exactly the month; it was some time in 1897, to the best of my recollection; it was the first part of the year, January or February. I could not say from his appearance whether the man he was talking to looked like a resident of Nashville or a stranger, but from his conversation I judged that he was a stranger. I heard Wallace say something to him about coming from some place in Ohio. I think he said Newark or some such place was, he said, the name of the town, but not being interested, I did not pay much attention to the conversation. I heard him say that he was from that same point; Wallace came back into my *stroe* a day or two after the conversation with this gentleman and asked me if the man had been back.

On cross-examination witness said:

His store was much frequented by the citizens of Nashville, as well as strangers; that he was in the ticket business, too, and
131 that the travelling public came there. I have been in my present place of business about three or four years. I did not know this man's name at all; had simply seen him come in there and talk with this man and only paid very little attention to it; of course, I could not help noticing some things they said standing there. They both spoke of being from the same place in Ohio—Newark, I think, was the name of the town. There was some other name this stranger mentioned; it was Coma or Homer. I recall Mr. Wallace spoke of it at the time; I think he said Homer, Ohio. I remembered the name at the time. When Wallace came in the second time inquiring about this man he spoke something about Homer, Ohio. I do not remember hearing the other man say any-

thing about Homer, Ohio, at the time he was in there, but understood that both came from the same place or locality there; I remember that.

R. A. HENRY, witness for defendant, being duly sworn, testified by deposition taken *de bene esse:*

I am now in the employ of the Fidelity Mutual Life Association of Philadelphia—manager for the Tennessee department. My office is # 30 Homestead building, Nashville, Tenn. Am acquainted with D. G. Wallace; first met him about two months ago. I had a letter from the president of the association requesting me to see Mr. Wallace in regard to this matter. I submitted to Mr. Wallace quite a number of photographs, and among them is that purported to be that of Mr. Hunter. That was done in the office of the chief of police of the city of Nashville. I had never before that submitted or shown to Mr. Wallace a picture that was a true picture of Mr. Hunter. The picture which had been sent me of Mr. Hunter had been kept in my possession all the time from the time it was sent until I submitted it to Mr. Wallace with the other pictures. The picture marked "Exhibit A" to the deposition of Mr. Wallace is the picture that Mr. Wallace identified as that of the man he saw in Floerish's cigar store. He specially recognized the front view, the picture on the left.

On cross-examination witness said:

Wallace said that he took the picture of the man sitting at the table with a pen in his hand to be the same as the other view, but that the front view was very distinct in resemblance. I do
132 not know whether in fact that is a picture of the same man taken in different positions; it is my impression that it is. I think Mr. Wallace understood that day that these two pictures were pictures of the same man in different positions, but I am not sure about that. I handed Wallace a bunch of pictures and asked him to identify any of them, if such they were, as the man he knew; that is the one he selected. I don't know where the other photographs are that I handed him, but I think I sent them to the company; there were seven or eight in number; they were simply photographs of men; one or two of them I know personally in the city; they were furnished me by the association; one of them only did I recognize personally as a Nashville man. I do not remember whether it was taken by a Nashville photographer—do not remember if I ever heard of Wallace until I received the letter from President Faust, of the association, requesting me to find him and ascertain the facts as he knew them.

Defendant offered the deposition of A. H. PIERSON, plaintiff's witness, who testified as follows:

Am 40 years of age; business manager of the Newark Advocate, and my place of residence is Newark, Ohio. I was in the same business and lived at the same place in 1897; remember the article which is marked "Exhibit A" and headed "Hunter is alive." It appeared in the Newark Advocate. I was in nowise connected

with the writing of said letter therein referred to and have no knowledge of it as I can now recollect; the files are in book form and we never allow the files of the paper to leave the office, as we only have the one copy on file that far back. By a comparison of the files of our paper I find that "Exhibit A" is an exact copy of articles published in the Daily Advocate of January 29th, 1897, and headed "Hunter is alive" (which is quoted fully in the deposition of D. G. Wallace). I only remember it by referring to files of the paper. I do not remember to whom the letter from Wallace was written, but remember that there was such a letter. I cannot say whether the quotation in said article is a correct quotation from Mr. Wallace's letter. Wallace formerly worked for the Newark Advocate, and at that time was a subscriber, and I presume it was from his interest in the paper that caused him to write to the Advocate. No agent or representative of the Fidelity Mutual Life Association of Philadelphia came to Newark and called on any representative of the Advocate and got the Advocate to
133 publish said article "Hunter is alive" that I knew of. I do not know that such a squib stating that W. A. Hunter had $90,000.00 insurance on his life, and intimate that while he may have disappeared that it did not follow he was dead, was published. I don't know anything about it. No one of the company's agents called at the time mentioned, to my knowledge, and no representative, to my knowledge, called to see the Advocate, or any representative of it, during the month of January, 1897. It is an impossibility to preserve the letters that we receive, and the one referred to as gotten from Wallace was probably thrown into the waste basket. We have no copy other than was quoted in the paper, which is the same found in "Exhibit A" attached to interrogatories. No agent of the Fidelity Life Association had anything to do with or procured the publication of any article as a news item or the article which appeared in the Newark Advocate concerning the disappearance of William A. Hunter, Jr., to my knowledge. I had no communication with that company, or any agent connected therewith. The first publication we made of the rumored disappearance of W. A. Hunter, Jr., was copied from the Utica Herald. D. G. Wallace, of Nashville, Tennessee, resided at Newark, Ohio, for a number of years, and was in the employ of the Newark Advocate for several years. I am unable to say for what length of time, but for several years. He lived at Newark, Ohio. The first knowledge I had of Hunter's disappearance was from reading it in the Newark Advocate. The only mention made was in the two articles in the Advocate headed "Hunter is alive," "Horses starved to death," so far as I know of. Wallace has been a subscriber for our paper four or five years, as nearly as I can recollect. While in Newark he was a dry-goods clerk and solicitor for the Newark Advocate, and represented said paper six or eight years, I should think, both in the country and city. A letter came to the Advocate office from the insurance company. I cannot give the date. It was late in the fall of 1898 or early in 1899. I have no letters in my possession, and do not know where they are.

Defendant offered in evidence the deposition of C. H. SPENCER, taken by plaintiff on the 2nd day of June, 1899:

Am 29 years old; reside at Newark, Ohio, and am associate editor of the Newark Advocate, and was in the same occupation during the year 1897. I remember the publication in said paper of the article marked Exhibit A, and attached to the interrogatories, and
134 headed "Hunter is alive." I recollect to have written this article and sent it to Mr. Hunter. It was done voluntarily by me, and my purpose was to convey some pleasing information to him. It was published in the Daily Advocate Friday, January 29th, 1897, and it reads the same as Exhibit A attached to interrogatories (which is the same exhibit heretofore copied in depositions of D. G. Wallace). I remember the publication of the article in the Advocate on January the 8th, referred to in Exhibit A. The letter from D. G. Wallace referred to in article headed "Hunter is alive" was either to the Advocate Printing Company or to some individual of the staff. I would say that the quotation from his letter in the article headed "Hunter is alive" was correct.

I made the abstract myself. Mr. Wallace some time prior to this was employed by the Advocate as a canvasser and solicitor, and, I presume, maintaining an interest in the Advocate, thought that we would be glad to get the item of news which his letter contained. No agent or representative of the Fidelity Mutual Life Association of Philadelphia came to Newark and called on me, or any other representative of the Advocate, and got the Advocate to publish the article "Hunter is alive." No one representing said insurance company called to see the Advocate, or any representative of it, during the month of January, 1897. The Advocate published the article as a mere item of news, and with no other purpose. I have no recollection as to what was done with the letter from Wallace, but presume it was thrown in the waste basket. It was not given to the insurance company, as I did not hear anything from it until last year.

On cross-examination witness said:

No agent of the defendant had anything to do with or procured the publication of any article as a news item or editorial, which appeared in the Newark Advocate, concerning the disappearance of William A. Hunter, Jr. We first received inquiry from the president of the defendant company, inquiring concerning the publication which had appeared in the Advocate. This was within the past year. I have not his letter or my reply, but the requested papers, containing the articles, I furnished him. The first publication made by us in the Advocate concerning the rumored disappearance of Hunter was copied from another paper, called the "Utica Herald," and was credited to said paper. D. G. Wallace, of Nashville,
135 Tennessee, resided at Newark, Ohio, for a number of years and for several years was in the employ of the Newark Advocate. I know his standing and reputation for truth and veracity in that community. Witness was then asked to state what his standing and reputation for truth and veracity in said community was; to which the plaintiff objected; which objection the court sus-

tained; to which ruling of the court the defendant then and there excepted, and could have proved by said witness that the reputation for truth and veracity of D. G. Wallace, defendant's witness, at Nashville, Tennessee, in the vicinity of Newark, Ohio, was good.

Wallace wrote to me voluntarily and referred to having met Hunter on the street car at Nashville and having shaken hands with him on January 22nd, 1897. He said nothing about a cigar store, that I recollect; am sure that he said that he met him on the street car, basing my statement on the quotation from Wallace's letter, as printed in the Daily Advocate of January 29th, 1897. I never heard from the insurance company until long after articles appeared in the Advocate. They were published in January, 1897, and I heard from the insurance company, as I recollect, late in the year 1898. I first learned of Hunter's disappearance from the article in the Utica Herald, which the Advocate reprinted in its issue of January 8th, 1897. They were bound in the files and cannot be produced, as we have no other copies. Mr. Wallace was employed in some mercantile business at Newark. Prior to his connection with the Advocate he was employed as a collector and solicitor for the book-bindery department of the Advocate, but worked principally as a solicitor and collector in the country; also did work in the city.

Defendant then offered to prove by Patrick Carson, Lee Johnson, and others the general reputation at Pecos, Texas, and in that vicinity, as to whether or not Hunter was dead; to which evidence the plaintiff objected, and, the court having sustained said objection, defendant then and there excepted and could have proved by said witnesses that the general reputation in Pecos and in the vicinity from which Hunter disappeared was that W. A. Hunter is not dead.

Defendant then moved the court to exclude the testimony introduced over its objections by plaintiff, undertaking to establish the death of Hunter by family repute (and herein contained in the testimony of the witnesses, W. A. Hunter, Sr., and members of his family at Homer, Ohio, and that of the plaintiff herein); which
136 motion was by the court overruled and defendant then and there excepted.

LEE JOHNSON, for defendant, further testified as follows: I know that a dam was built across the Pecos river above the Pioneer canal at Eddy, New Mexico. After it was built, it had the effect to diminish the flow of the water in the river below the dam fully one-half. The water is used up in New Mexico in the Pecos, and is practically consumed up to where the dam is. The Pecos river is supplied from that dam down to Pecos city by springs. The effect of building the dam and the use of the water upon the stream in the summer time is to make the water very low unless there is a heavy rain. I never could tell much difference except when a rise was on between the flow of water below the dam in winter and summer.

On cross-examination witness said: They used the water above the dam more or less all during the year. Did not irrigate crops in December. It is ninety miles from Pecos, Texas, to Eddy, New

Mexico. They have a large storage reservoir for water up there. We kept a man riding the Pecos river up and down all the time to keep the cattle out of it. We have a frontage in our pasture of thirty miles on the river. Cattle don't bog so bad after the river has been low for two or three months and the banks settle. The condition of the river in December depends upon the rainfall. As a rule, don't have any rain down there in September.

H. C. SLACK, witness for the defendant, being sworn, testified as follows: "Have lived in the Pecos country since 1882, working cattle most of the time; am pretty well acquainted with the Pecos river and its condition; became so by working along the river with cattle. I am the same Slack that was with the hunting party in search of Mr. Hunter in December of 1896. R. S. Johnson first asked me to go. I went up to Mentone; was gone two days; found nothing. A short time after that I went again, about the last of December. Joe and Tom White were with me at that time. We found the Hunter outfit and found a great many other people there—R. S. Johnson, Jim Gibson, Mrs. Johnson, Mrs. Mettler, and a couple of cow boys, Geo. Mansfield, maybe, and R. S. Johnson's boy. I don't remember all the articles at the camp. We found a bed, a Winchester gun, and some hay, some provisions; don't re-
137 member what was there in the way of implements; don't remember that I saw any ax or saw. I helped search around the camp. I saw footprints there leading in the direction of the river. There was a place where a little fire had been built. It was small. You could just tell on the ground there had been a fire. There were some little pieces of wood around it. I know the point on the river, close to the river bank, where it is alleged that the root is broken off and tracks leading up to that point. There were tracks leading in another direction towards a little peninsular in the river that looked as though he walked along as many as two or three times. It looked as if there were bucket prints where a bucket had been set down on this peninsular on the bank of the river. This was a little point down the river; cannot tell exactly how many footprints were down there. There were some two or three; looked like he had been down and back twice. The tracks went down to about two feet of the water. They were tolerably plain. The water in the river below the last footprint or bucket mark on the peninsular, I think, was about two feet."

Here the court adjourned until tomorrow morning at 10 o'clock.

FRIDAY, *June* 1, 1900—at 10 o'clock a. m.

H. C. SLACK further testified:

"I remember the discovery of other footprints. There was a mesquite limb discovered near the bank of the river that had been broken off. The footprints at that point were about 10 or 12 inches from the bank of the river and pointed mostly up the river. This root or limb was not broken off smooth, but had splintered back." (Witness places his feet on a paper showing the position of the foot-

prints with reference to the bank of the river and the location of the root and the position of the feet when it is supposed the root was broken. The root was 10 or 12 inches from the bank. Witness then indicated by placing a pencil on the paper showing how the root was laying.) "My recollection is that this point was nearly perpendicular. It was not entirely so. From the bottom of the bank to the water edge I think there was something like a foot and a half and a little sand bar—that is, the water came up to within a foot and a half of the bottom of the bank at that point. I saw no indentation on the sand there of any character. The sand was smooth. I crossed the river on that day, going to and from the outfit, about 8 miles above town, on horseback. The waters were up about to my stirrup on a small horse. The horse is about 14 and a half hands high.
138 I did not have to take my feet out of the stirrup. This crossing was about three or four miles below where the outfit was found. Joe and Tom White crossed the river with me that day. There were part of the searching party. We all crossed the river on horseback. I think I was there again some time in January following; about the 20th. Mr. Milliken, Mr. Gibson, and Mr. R. S. Johnson were with me. Then we made some measurements. On that day the water was higher than at the time of my former visit to the camp. The water was above the peninsular on the 20th of January. I think it was 8 or 10 inches above the last footprints on the peninsular we discovered when the camp was first found, and the water was up close to the bank underneath where the root was broken on January 20th. I waded into the stream on that day; think I went in from that peninsular and waded up the stream out into it quite a little ways. I waded up the river some 20 feet, and waded up opposite the broken root (indicating his movements by reference to the map offered in evidence). Just after the peninsular the water was about 2½ feet deep and was of the same depth opposite the root—about 6 or 7 fee into the river. I from there out, towards the center of the current, went out to the middle of the current. The bed of the stream is a gradual descent from the bank out into the river. In the center of the current it was over my head. I am 5 feet 7½ inches high. It was a gravel bottom; hard, firm gravel; towards the edge of the bank it was mud. My feet sunk in the mud just down over my ankles. I didn't stand still, but was moving nearly all of the time I was in there. The water was very cold. They insisted on putting a rope around me when I went in; they were afraid I might take cramps going into the water, but I had nothing indicating the cramps. I have been along the river since 1882. The volume of the water that flows done the Pecos has been decreased in the last 8 or 9 years down about Pecos; don't think it run more than half it did before the dams were put in. The dams I refer to are located about 8 miles above the town of Pecos and one at Eddy, 85 or 90 miles. There were some pictures taken where the camp outfit was found in May of 1898. I was there." (Witness recognizes his picture, holding the horse out in the river, and identifies Mr. Estes and Mr. Randolph in the same picture.)

"I was in the center of the current when it was taken and had a couple of horses. There was no quicksand down
139 there then. It was a hard, firm bottom. These horses were about 15 hands high. The water was 2½ feet deep where they were standing. I was holding the horses at a point opposite where the broken root or limb was found, and was in that place when the pictures were taken" (identifies the picture which shows him holding the horses in the stream). (Witness identifies the picture he appears in as one taken in front of the peninsular.) "The one with one horse was taken right opposite the root. The other people in the same picture were Estes and Randolph." (Said pictures were then offered in evidence, marked "C" and "D.")

The surface of the ground on the bank where the root was broken off had tufts of grass along the bank. It was what is called salt grass, and was scattered around over the ground. A party could walk on these tufts of grass and not make any footprints at all. I did it myself. I started from where this root was broken and walked off quite a little distance, and could have gone three miles, if I had wanted to, on the tufts of grass without making any tracks. I did not see any valise of any character among the articles found at the camp; don't remember seeing a hatchet nor a saw; don't remember the articles that were in the wagon.

On cross-examination witness testified: I was in Pecos in December, 1896; am the same Slack that rode up to Mentone, in Loving county, to see what had become of Mr. Hunter. I went to Mentone, on the east side of the river; crossed the Pecos on the bridge and turned up on the east side. I trailed one wagon and horse right up close to Mentone; could not tell how many horses were in the wagon; supposed to be two. Two was all I could see; tracked them pretty close to Mentone. Did not strike any trail for the first ten or twelve miles; saw horse tracks all along, up and down the road, for some six miles, and wagon tracks the first eight miles. The Hunter camp was several miles above the dam. I never saw any wagon tracks or horse tracks on the road north of this point until I got within about eight miles of Mentone. I found some wagon tracks coming out towards the river and traveled up the road a few miles and had camped, and I could not trail them away from there. It was very dim. The camp I found was where a fire had been built and some sorghum fed and the parties ate. This was not the camp where we found the Hunter outfit. On the 29th of December I went with
140 a party up to the Hunter camp; saw where a wagon drove along the slough; did not see where it turned off the road; the first wagon tracks that I could see were 150 or 200 yards from the road; saw no wagon or horse tracks in the road. I first met Milliken in January, 1897; give Milliken a written statement, signed and sworn to by me. I made no changes in the statement, but read it over. Mr. Gibson and I did not examine any horse tracks on the road; we did at the wagon; there were several tracks there; don't remember about a big track; they were just common horse tracks. I have been up to the Hunter outfit five or six times; first went by myself; second time in January, 1897, but I had gone with the

White brothers December 29th, 1896, that was when R. S. Johnson and wife, Mrs. Mettler, Gibson, and others were there; the third time was about the 20th of January, 1897, with Milliken, Johnson, and Gibson, and this was when I went in the river. Milliken dug the bank with a spade on that day; took some measurements. The fourth trip was about a year after that, in January, 1898, or, perhaps, in May or June. Witness was handed the picture having the two horses in it, marked "C," and said it was taken in May, 1899. There are changes in the Pecos river every year and ever- rise. At my trip to the camp in December, 1896, the water in the river at the place where the root was broken was about a foot and a half out from the bottom of the bank. On January 20th, 1897, there was barely room for a man to stand on this bank at the bottom between the water and the bank. A map showing the water $8\frac{7}{10}$ feet from the bottom would not show it correctly at the time I was there in December, 1896, and January, 1897. It would show it correctly in May, 1899. This perpendicular bank was about as high as my head in December, 1896, and January, 1897—that is, if I were standing on this eighteen inches of sand at the bottom of the bank. In May, 1899, the water was lower, the bank about the same in height*h*, but was not in the same condition as when I first saw it in December, 1896, and January, 1897. Between January, 1897, and May, 1899, there had been no particular change in the bank, only we had shoveled the bank off with a shovel. In May, 1899, the water was about eight and a half feet from the bottom of the bank. I do not remember Milliken making any trip to the camp without my being with him. The pictures marked B 1 were pictures taken on the same day as the one with the two horses. If a man fell in the river the chances are that he would have to go down the river a little
141 before he could get out; the distance depended altogether on how he handled himself. If he fell in and could not swim, I think he would go right to the bottom. When I waded in the river I did not stand still; might have stopped for a second. If I had stopped in that mud don't think I would have sunk in it; kept moving because it was so cold. I never did have cramp in the river; there might have been danger.

On redirect examination witness said: The fire at the camp showed signs of some burnt sticks, the ends of which were not burnt up; they were of different sizes; the largest something like as large as my wrist; compared with the root broken off on the bank of the river, as to appearance and quality of wood, we pronounced this largest stick to be the same; it was the size of the end that was broken down in the ground; the limb was larger; it was mesquite wood and the broken limb was the same kind as the root or limb in the ground that was dug up, and its appearance corresponded with the largest size stick found at the fire; the spading of which I have spoken was done to get the root out of the ground and to throw the dirt down, I believe; the dirt was dug from the top of the bank and thrown down on the little sand bar to enable one to stand there. Witness indicated on the map that the spading was done at the point where the root or limb was broken.

On recross-examination witness said: The dirt at the bottom of the bank was soft and we shoveled some from the top to stand on; not so very much. It was a limb and not a root that we found broken off; all that country is full of mesquite timber; there are a great many other limbs around there of that character and same size up and down the river. I suppose I could have gone out and got an armful of that same size; this limb that was dug up had sediment of the dirt on it that looked like this other one, the end of which was found at the camp-fire. I suppose all these limbs around there on the bank would have sediment on them; the end that had splinters on it was the end that was in the fire; the end away from the bank was the way the root pointed; it was broken right in two. Witness indicated with a pencil that the end of the broken limb pointed from the river, and said it was only about eight inches to the edge of the bank; that they dug up a small chunck and put it in the bottom of the buggy; all the search that was made on the 29th of December, 1896, in the river, was to tie a rope to a rake and throw
142 it in the river and draw it back a time or two, and we searched around in the mesquite and went down to the dam, about four and one-half miles. I have waded in the river lots and lots times, and lots of places bog down to your knees, and some places to your ankles, and other places, during and after a rise, you bog down deeper. The last time I was there, at the point where the broken limb was dug up, I rode a horse into the river about to the middle of the current; think it was rising; crossed the river above that point on a horse, which horse was about fifteen hands high, and the water came up about half way his sides, or not quite so far. The horse did not bog in the place that I rode in, opposite the root or limb; had no difficulty in getting out. The consistency of the mud in the bottom opposite the mesquite limb was light mud, just like our soil is—sandy mud soil.

A. J. Brown, witness for defendant, being sworn, testified: I am State agent of the defendant company. As to the circumstances leading up to the making of application for insurance by Hunter, Mr. Hunter came in my office and during the conversation that followed said that he had thought of taking out insurance; that he and his brother-in-law had gotten into an irrigation scheme and had bought a good deal of Pecos Valley land and owed a good deal of money on the land, and his brother-in-law had afterwards died, and he thought, if he should happen to die, his sister would lose what they had paid. For this reason he thought of taking some insurance, so that she could pay the land out in the event of his death. The application was made in my office, at Dallas, and the premiums paid there and the policies delivered there to Hunter. I have been State agent of defendant since October, 1889. I knew William Hunter at Alvarado, Texas, about 1888, *w*ince when I have not seen much of him. I forwarded Hunter's application to the home office of defendant, at Philadelphia, Pennsylvania, where the policies were issued, and they were then forwarded to me. Hunter stated that he was in the real-estate business and farming. I had a

talk with him about irrigation matters. I understood it was in connection with his farming. While at Alvarado he was keeping books. Defendant company does business in about forty States and have general offices in each of the States and sub-agents as far as they can. I think I have about forty on my list in this State. The company writes some fifteen or twenty millions of insurance in a year.
143 They have about seventy-seven millions in force in the United States. I knew Mr. Hunter well, but not intimately. At the time he was in Alvarado I was away from home. I thought Hunter was a man of good character or I would not have written him. The policies taken by him were the cheapest the company issued at that time; they were what is called "ten-year term policies." If he had died within ten years the policies were good for their face, if the premiums were kept paid. He paid semi-annual premiums of the $15,000.00. It was $97.65. An ordinary life policy for the same amount would have been double that. Mr. R. C. Milliken is an inspector for the company. An inspector is one who goes through the country and looks after the risks that have been written and sees that the business is being done in a clean, legitimate way. Mr. Milliken's headquarters are at Atlanta, Georgia, I understand. He comes to Texas. I think Milliken's business is mainly to detect any fraud and to get up evidence, I presume, in cases. I presume he makes search for missing parties, but don't know. The company has a right, I think, to write any agent they have about anything they want to know. If they want information in Texas they write to me and I write to my agents. This company does not maintain any lodges or assessments; do a regular life-insurance business; been in business about twenty-five years; organized under the laws of Pennsylvania, I think; has a permit to do business in Texas. I never saw the charter. It has no organization in Texas doing business through lodges and councils.

On redirect examination witness said: Hunter told me he wanted something cheap. I explained to him the different kinds and rates of the policies. In the event of loss by death among the members of the company, if there were not funds enough on hand to pay the loss, they had means of providing funds. At the time these policies were issued they were limited as to what was known as the assessment law, and it collected a regular premium, but in the policy there was a clause that provided for an assessment if it should become necessary. They have since changed their method of doing business, but when these policies were issued they had a right to levy an assessment under condition. All correspondence relative to this business was done through my office. I did not advise my agents of these circumstances concerning the disappearance of Hunter. I don't remember ever communicating with them ex-
144 cept in conversations with them in the office or out in the field. I presume I have mentioned it to a good many of them. I don't think I ever inquired about Hunter, or told my agents to look out for him. I told some — them that he had disappeared; did not communicate with them systematically or take the matter up and notify them by mail. Whatever was done just

came up in the course of conversation. Don't know what the home office did. To illustrate what I mean by the rate on insurance under the assessment clause, say we take a man at the age of forty, the ordinary life policy in an old-line company would cost $32.20 per thousand. Ours would be $21.89. The old-line premiums embrace an overcharge, which would be returned in dividends, if not needed. Instead of taking the overcharge and returning it in dividends, defendant left it in the members' pockets, but claimed the right to call for it if an emergency arose. The rate per thousand at the age of forty on the kind of policy Hunter got was $15.60. In the event the association needed more than had been collected, the company was required to collect only so much excess as was necessary to put it in a good solvent shape.

Defendant propounded the following cross-interrogatories to W. A. Hunter, Sr., whose deposition was taken by plaintiff:

"Are you solvent? What are you worth over and above exemptions? Have you agreed or refused or are you willing to become surety on the bond for cost in this case in behalf of plaintiff?"

To which plaintiff then and there objected because it was immaterial; which objection was then and there sustained; to which ruling by the court defendant then and there excepted, and offered and could have proved by the answer of the witness to said interrogatory that he was solvent and worth $3,000.00 above exemptions, and was not willing to become surety on the cost bond of plaintiff.

The witness W. A. HUNTER, SR., testified, in answer to cross-interrogatories propounded by defendant, that he never offered any reward or took any steps to find W. A. Hunter, Jr., either dead or alive, after he heard of his disappearance; that he made no inquiry concerning the said W. A. Hunter, Jr., save through his daughter, Mrs. Mettler; that he did not have the Pecos river seined, and made no search either of the river or elsewhere, or any effort to find him or his body. Newark, Licking county, Ohio, is sixteen miles
145 from witness' home. When witness saw the articles published in the Newark Advocate about the disappearance of W. A. Hunter, Jr., he did not go there to see the editor of said paper. The town is not connected by rail with witness' residence. The same facts as to failure to offer reward or to make any search or inquiry for W. A. Hunter, Jr., were elicited by cross-interrogatories from Charles E. Hunter, brother of the plaintiff and W. A. Hunter, Jr.

R. S. JOHNSON testified as follows: I am county treasurer of Reeves county, Texas, and have been since 1898, and am a candidate for re-election; knew Mr. Hunter and Mrs. Mettler at Pecos; knew the Powers horse for a number of years. I think I knew him before Powers owned him; saw the body of the horse after he had died about a mile and a half south from the depot, and south of the Texas and Pacific railroad at Barstow. Barstow is almost due east from Pecos on the Texas and Pacific railroad. By the schedule on that road, according to my recollection, on December 3rd, 1896, trains coming from El Paso to Fort Worth and Dallas, which are going

east. arrive at Pecos at 11.20 p. m. and at 2 o'clock, going west. Barstow is six or seven miles, and the trains run about twenty-five miles an hour. I was one of the parties who went in search of Hunter on December 29th, 1896; went with Mrs. Mettler and my wife and little boy. Mr. Gibson and others also went. When we got to the camp we found the harness lying in front of the wagon tongue. On the right of the wagon were two buckets, and on the left a bed made down and a gun was sitting between the wheels of the wagon where the bed was; that is all the articles on the ground. There were two full bales and a broken bale of hay in the wagon and a stove, three joints of stove-pipe, and a large tin can—a fifty-pound lard can—a small box, about 14 x 20 inches, containing canned fruit and some knives and forks, two tin plates, and, I think, a cup or two. I don't remember seeing a hatchet, saw, or valise; examined everything that was in the wagon. I remember the place where the limb was broken off. It was from sixteen to twenty inches from the bank, about eighteen or twenty inches from the toes of the footprints. I remember the location of the footprints and of the broken limb with reference to the configuration of the bank. (Witness designates on paper by taking position with reference to the paper representing the bank of the river.) The end of the broken limb pointed towards the bank. The limb or root was broken and splintered off from the
146 upper side. It was pulled up and sprung back and made indentations in the bank. Slack, Milliken, and I were there when it was dug up. This imbedded piece was from fifteen to eighteen inches long. I think we dug it part of the way and pulled the balance out. I saw the ashes at the camp-fire. I don't think there was much over a quart of ashes. There were twenty or thirty unburnt sticks about as thick as my finger and other larger pieces. We found a piece that conformed in size to the root we found imbedded in the ground. It was about the same size and kind of wood, both being mesquite; have had considerable experience in handling mesquite wood; lived on a ranch about fifteen years and used no other kind. The piece we found at the fire looked like it had been lying on the ground, and the piece found at the fire and that dug up at the bank of the river looked just exactly alike. The surface of the ground around had salt grass growing all over the whole valley. Tufts of grass were within fifteen or twenty inches of this root all around. A man could walk away from these footprints at the root on the tufts of grass without making any indentation in the sand. I saw it done by Mr. Slack.

On cross-examination witness said: The Powers horse looked to be eight to twelve years old. I saw this dead horse on January 20th, 1897. He was a big, bald horse, with three or four white feet, and had a bald face. He was in a good state of *perseverance* when I saw him. At the time of this occurrence Powers lived at Pecos, Texas. I am in the saloon business at Pecos, and have been since 1890; have rooms up over my saloon. Mr. Milliken left the hotel and took a room with me that he could get one so that he could have a fire in it. I have attended this court every term since this suit was filed; think I went to the river three times with Milliken. It was a

limb and not a root that we dug out of the ground on the bank of the river, and the piece we found at the fire was not a root. The pieces at the fire, except one, were little twigs. Of course, I could not tell where they were gotten. The piece found at the fire which compared in size with that dug up on the bank of the river was about twelve or fourteen inches long. It was not rotten, but sound. It took a pretty good pull to get the piece out of the bank. The grass there is called salt grass. Where there is a good deal of alkali there is less grass; saw a black sack coat with other things at the camp; was acquainted with Hunter; probably met him
147 first in 1893 or 1894. I think he stood well in the community. I probably went on his bond when he was elected sheriff, but I don't know; did not, unless he was elected at the first organization of the county. The soil between these tufts of grass mentioned is loose, reddish soil. A man walking on the soil would make plain tracks. I think the river was about five or five and a half feet from the bottom of the bank when we got there December 29th, 1896. It was not right up to the bank. I was there on January 20th, 1897. The water was higher and pretty deep in the river, six feet and a half inch. We measured it by Slack going in and going down over his head. The bank sloped a little toward the river at the place where the root was right down on the edge. The track showed that the left foot had slipped. The inside of the left foot had left the deepest impression on the soil. We don't have as many blizzards as we used to have; have east winds, but seldom have "northers." We used to have sand storms, but have not had any severe ones for five or six years, but have had some pretty high winds. The last time I was here I saw one about as bad as we ever have. The town of Pecos is a little less than a mile and a half from the river. Last Monday a week ago Mr. Randolph, Mr. Slack, and myself made some measurements as to the velocity of the current near where this accident is supposed to have occurred. We went above that point where the river makes a straight shoot about 120 or 125 yards straight up the river—it is almost straight—and for 200 yards below where the limb was dug up. We went up the river about 125 yards and set three stakes and a line across the river, and measured down one-sixteenth of a mile and set three stakes there, and then came back about where we first went and threw a chunck in. I think the chunck had been an old railroad tie. It was pine and pretty heavy, about fourteen or fifteen inches long and two and one-half to three inches square. We threw it in the channel. We calculated it would take sixty-four minutes to run two miles. The wind was a little northeast to blow it down the river. There was no obstruction in the river to hinder the flow. I never heard of any measurement of the speed of a river by throwing a chunck in it before; don't know whether a feather would float off and leave the chunck in the same stream or not; never saw two pieces put in a river and one float off and leave the other. I don't consider the Pecos a swift river. It runs at a very good rate. At the
148 same time we made these measurements by throwing a chunck in the river the horses were ridden across there. The water

struck the horses a little above the midway of their sides. Mr. Randolph was there and is the man who took the measurements.

H. B. McDONALD, witness for defendant, being duly sworn, testified: Am book-keeper for the City national bank in Dallas, and have been for six or seven years. The books show that W. A. Hunter had a deposit in that bank in 1896. It was withdrawn November 7th, 1896. He drew out $163.31, which balanced his account; cannot say how long that balance had been with us. I traced it back to 1894. The last check prior to November 7th, 1896, was October 31st, 1896, for $97.65. As far back as this book goes, June, 1895, there were no other checks drawn on this account.

JOHN B. LITTLER, witness for defendant, being duly sworn, testified as follows: I live at Big Springs and am county judge of Howard county, Texas, serving my second term; have lived out there nine years; am from Ohio; remember the circumstance that some time in June, 1897, my wife and I returned from a visit east. We left Ohio on the morning of the 8th of June, 1897, reached Terre Haute, Indiana, about one o'clock that day and stayed there until one o'clock on the day of the 10th, when we left and reached St. Louis the night of the 10th; left there on the same night for home; remember meeting a gentleman on the sleeper on the Iron Mountain road, at or near Little Rock, in which some conversation arose as to whether the party was a sheriff in Texas or not. When the train reached Little Rock, on the morning of the 11th, my wife and I got off to get breakfast. After breakfast I got back on the Pullman and went in the smoking compartment. There were two other gentlemen in there, is my recollection, sitting in the smoking compartment. After a few minutes we engaged in conversation, and I made some remark that led them to believe that I was from West Texas. Immediately after making this remark this other gentleman remarked, "This gentleman was sheriff of Loving county," and I repeated, "Loving county?" and he said, "Yes." I then tried to engage the party who was pointed out to me as the sheriff in conversation and said something about the financial condition of Loving county, and in substance remarked that Loving county was in a bad tangle financially, and he said, "Yes." I might have asked him one or two other questions, and
he answered me in monosyl-ables. It was entirely in
149 regard to the financial condition of Loving county. I made
a remark as to the county's bad tangle financially, and almost immediately after this remark was made, that this gentleman was a sheriff of Loving county, he got up and left the smoking compartment of the sleeper. I remained there until I got through smoking, and then went out to find him and have a talk with him. I was interested in the financial condition of Loving county. I held a piece of its script, and this was the first officer I had seen from that county, and I was interested in knowing something of its financial condition, and went to hunt him to talk about said condition. In the meantime the train had, perhaps, made one or two stops, and I

failed to find the gentleman. My recollection is that I went through the sleeper and the car next to the sleeper and never saw this man any more. He was a man a little taller than I, but not so heavy. I guess he would weigh 165 or 170 pounds; did not stand as straight as I do. He had no moustache. I could recognize his photograph. I did shortly afterwards.

Witness was handed a number of photographs and asked to select and point out the one of the man who was in the sleeper. Witness selected the photograph admitted to be that of the said W. A. Hunter.

On cross-examination witness testified: The man I saw was dressed in dark clothes, cutaway coat, black hat—I think stiff. My recollection is he had on a standing collar. I never saw either of the gentlemen I saw on the sleeper before. I never made a statement that I went in the smoker and two strangers were in there, and that a short time after one of the strangers got up and left the car, and that I and the other got in conversation after the one had left; never made the statement that the stranger told me that the man who left started that he was a sheriff of Loving county or had been. I knew Mr. Alexander, a lawer of Dallas. I remember the day I was in his office on Commerce street. I did not state in conversation with him that I went in the smoker, and that there were two strangers there, and that one of them got up and went out, and that I engaged in conversation with the one that remained, and that he told me that the gentleman who had just left stated that he was the sheriff of Loving county, and that after that I got up and went to hunt for him and could not find him; never in substance. The substance is substantially as I have stated here. The only difference is
150 he told me that before he left the smoker. My statement is that before this stranger left the smoker he was pointed out to me. He did not leave the smoker before he was pointed out. About the only difference between my statement here and your question is that the party made the remark to me, "This is the sheriff of Loving county," before the supposed sheriff left the smoking compartment. It is not true that I told Mr. Alexander that I did not have any conversation at all with this supposed sheriff of Loving county. The stranger did not tell me the name of the supposed sheriff. There was no introduction. I did not know his name, nor he mine. I expect I told Mr. Alexander in the conversation referred to that in about six months after that I was shown a picture, but I would not swear that it was the man supposed to be the sheriff. I won't swear now that it was Hunter. I do not know that it was Hunter; never saw Hunter in my life, unless that was him on the sleeper. I did not tell Mr. Alexander that I could not swear that the picture that was shown me six months after this trip was the photograph of the man I saw in the sleeping car. I first saw Mr. Alexander in Abilene, Texas. He was the attorney of the Texas and Pacific Railroad Company, and I was a witness in the case. It was the case of Nunn against the railroad. Mr. Parker,

the court stenographer, I think, took down the testimony in that case. I testified twice in that case, but did not change my testimony. Mr. Parker reported the case both times. The last time I was on the stand I was asked questions that I was not asked before. My statement varied from this cause. I think the man whom I saw on the sleeper had sorter brown eyes and fair complexion. My recollection is that I did not see him with his hat off. I think Mr. Milliken showed me the picture some time in December, 1897. The trip I speak of was in June, 1897; did not know in June, 1897, that Hunter was missing. I had only been at home a few days from off this trip. It was probably the first of July when Mr. Estes, from Pecos county, came to Big Springs to examine some records there. He is the first man I ever talked to about it. I have since talked to Mr. Milliken. Estes came to Big Springs to examine the records regarding Loving County lands. A man who has a moustache like that picture looks quite different when he is smooth-shaved. This double picture was shown to me and I identified it. I saw him with his hat on and his moustache shaved off—only had a few words with him. He was smoking. Don't think that he was in the smoker five minutes after I
151 went in. The other man in the smoker had a dark moustache. He was not as large a man as the supposed Hunter, and tolerably fair complexion and wore a soft hat, and my recollection is he had on dark clothes—what is called a frock coat—and don't remember his shoes nor the kind of shoes Hunter had on. I remember distinctly another man came in there; was the train master of the Iron Mountain road, and travelled with us to Texarkana, where he got off; think he was smooth-shaven and sandy complexion; cannot describe his clothes; think he had a sack coat on. I got on the sleeper at St. Louis. As a rule, there are a good many people coming South on the night sleeper.

On redirect examination witness said:

Mr. Estes came to Big Springs about the first of July, and I helped him look up the records regarding Loving County school lands, and in a discussion he mentioned the sheriff. In December following I saw Mr. Milliken. When I was handed the picture I put my hand over the moustache and made the remark, That is the picture of the man I saw on the sleeper.

On recross-examination witness says:

I tell the jury I placed my hand over the moustache in the picture and recognized it. His hat did not go down over his eyes, but it was just on top of his head. There was nothing peculiar about his hat that attracted my attention. Did not notice his eyes particularly; nothing peculiar about them to attract my attention, nor his nose. The picture looked familiar when handed to me, with the moustache, but I would not be positive until I placed my hand over it. He wore a derby hat.

Here defendant rested.

Mrs. METTLER recalled and identified the photograph of her father and said it had been taken five or six years. He was born in 1828. Has worn a beard like that ever since I can remember. The photograph was offered in evidence. My brother, W. A. Hunter, came to Pecos, where I was living, reaching there about two o'clock Monday morning, stopped at the Commercial hotel, which was kept by Mr. Miller; came to see me in the forenoon and a little while in the afternoon, and ate supper with us and spent the evening and went back to the hotel. I saw him against next morning and again in the afternoon. I was then boarding with Mrs. Hardeman. The next day we went out and got the Powers horse and the wagon I had left out there at Mr. Powers' house. The Powers horse was an
152 ordinary, common brown horse. It was a great deal larger than my little pony. My brother got some things at the store and came back and got his grip and brought it to the house and turned it over to me. It was a telescope grip. I never saw him have any small leather grip with a strap on it. When he left my house he did not go by the hotel; that would have been out of his way. Witness identifies a picture, taken when he was attending Eastman college. I think it was taken about 1884; don't remember to have ever seen him without a moustache. My brother had no insurance on his life in September, 1896.

J. B. GIBSON, recalled by plaintiff, testified as follows:

Gibson was handed a sketch of the town of Pecos. Witness points out to the jury the location of the different points, showing the direction where Hunter would have to go. From where Mrs. Mettler lived he would not have to pass the hotel. Witness said he knew Mr. Randolph, county surveyor, and had a conversation with him a week or so ago about the survey of the river. Witness was asked to state what the conversation was; to which the defendant then and there objected because it was immaterial; which objection was by the court overruled, and defendant then and there excepted to said ruling, and the witness testified: I asked Randolph if he made a survey of the river from the dam, about where the wagon was, on a straight line, and he said he did. I asked him what the distance —. I think he said it was a little over four miles. I then asked him if he surveyed the meanderings of the river, and he said he did, and that the distance was just a mile further. I asked him if he followed the river right around all those bends, and he said he did, and I said, I know that river is more than that. I know it is more than five miles, and I will have it surveyed, and turned around to my desk to make a memorandum, and said, "Did you say four miles on a straight line?" and he said, "Yes," and he said, "It is only five miles and something with the meanderings. Well," he said, "you can say anywhere from ten to twelve miles."

I introduced Mr. Milliken to Capt. Irvin. They had a conversation in my presence. Mr. Milliken wanted to know the dates when the captain first saw the Powers horse. I think Capt. Irvin said, as near as I can remember, it was about the tenth or fifteenth of De-

cember; don't think Milliken mentioned anything about the
153 date in my hearing. I saw a rope supposed to have come off that horse. The rope was twelve or fifteen feet long, and was about an inch rope, and appeared to be old and about half worn out. Near one end was a knot, like it had been tied around the horse's neck. There was a little evidence of its having been dragged, but I cannot tell whether it had or not.

The court adjourned.

Saturday morning, June 2nd, 1900, the court convened. It was admitted that there was but one payment of the premium, and that there had never been a tender back of the premium paid.

W. M. ALEXANDER, witness for the plaintiff, being sworn, testified as follows: I reside in Dallas, and have since 1883. Since 1884 I have been practicing law; am acquainted with John B. Littler, of Big Springs, slightly. First met him in Abilene in 1896 and possibly 1897. I was there to try a railroad case for the Texas & Pacific road. My recollection is that Judge Littler was there as a witness for the company. After the institution of this suit Judge Littler was here in attendance upon this case, that had been set for trial, as a witness. I called at his hotel and got him to come to our office in Dallas. I asked him what he knew about the case, and he said that the previous summer, at Little Rock, Arkansas, he was a passenger going west; that he was in the Pullman car, and that a stranger stopped at Little Rock, and he had been out at lunch or something and came back and entered the smoking compartment of the sleeper, and that there were two gentlemen in there when he entered, and as he entered one of them got up and went out, and that he engaged the other gentleman in conversation, and it was discussed that he (Littler) was from Texas and this gentleman who remained in the smoker said that the gentleman who had just left is from Texas and is an ex-sheriff of Loving county. This gentleman remained in the smoker. This gentleman remained in the smoker and he said that he would hunt up this former Texan, and he walked out through the car, but did not find him. I asked him if he was acquainted with this ex-sheriff, and he said "No," that he had never had any personal acquaintance with him. I said, Well, was that the man you saw go out of there? and he says, I will tell you some time. After that he was talking to Mr. Somebody, county attorney (I don't remember the county attorney's name), but he was talking to him about his disappearance in Loving county and he said,
"Why, I saw that party at Little Rock," and this county attorney
154 had a picture and showed it to him, and he said, I think that is the man; and I asked him if he could identify him after the lapse of time—some time had elapsed, and I asked if he could swear it was the party, and he said, "I may be mistaken," but am reasonably certain that was the party I saw. I am positive that Judge Littler stated that the stranger in the smoker told him that the gentleman who had just left was an ex-sheriff of Loving county. I am positive he said that was when the train was stopped

at Little Rock. He said he believed that was the man. I know I was impressed with the idea of the force of his testimony if he could positively swear to the identity. I cannot tell just what his remark was. He said he thought or believed it was the man. He did not say anything about having talked with the man who left the sleeper in monosyl-ables, or that he made answer in monosyl-ables. My recollection is that he said this ex-sheriff of Loving county was smooth-shaved. I have no interest in the recovery of this suit.

On cross-examination witness said: This case was taken upon a contingent fee. I have dissolved my partnership with one of the counsel, Mr. Clark now conducting it by mutual consent. We had quite a volume of business on hand, and this case came to my firm through the former acquaintance of Mr. Clark with Mr. Gage, and in the disposition of the business we made an equitable distribution. I took part and Mr. Clark part. Think the previous terms the attorneys have advanced the expenses of the witness Mr. Gibson. I mean the firm of which I was a member—Alexander, Clark & Hall.

The above and foregoing was all the evidence introduced on the trial of this cause, and thereupon and upon the conclusion thereof, before the jury retired, defendant asked the court to give the following instruction to the jury (omitting caption and signature), to wit: "You are instructed to find for defendant;" which instruction the court refused to give; to which action by the court the defendant then and there duly excepted.

Upon the conclusion of the evidence the court, among other things, charged the jury, in writing, as follows:

"If you should find for the plaintiff, you should estimate her damages at the face value of the policies, which is $15,000.00, together with 6% interest thereon from December 2nd, 1897,
155 which is the date on which this suit was instituted in the State court, down to this date, June 2nd, 1900, and also 12 per cent. on the total of the face of the policies and interest, as damages, and you should also find for her reasonable attorneys' fees for the prosecution and collection of her loss," stating each item separately; to which instruction by the court the defendant then and there excepted, and defendant then and there requested the court to give the following instruction to the jury, to wit:

"Plaintiff is not entitled to recover attorneys' fees or penalty, even if you should, under other instructions given, find that plaintiff is entitled to recover on the policies;" which instruction the court then and there refused to give; to which action by the court the defendant then and there duly excepted.

The court in his general charge to the jury also gave the following instruction:

"While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is

presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead;" to the giving of which instruction the defendant then and there duly excepted, and requested the court to instruct the jury as follows:

"The law presumes that the life of any person continues for seven years after the last time he was seen alive or heard from.

The death of a person may be established by circumstantial evidence, but in such cases the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue—
156 that is, the death of the party. Unless, therefore, the plaintiff has established the death of William A. Hunter, Jr., by the certainty hereinbefore set forth, the jury should find for the defendant;" which instruction the court refused to give; to which action by the court defendant then and there duly excepted.

The court further instructed the jury as follows:

"If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3rd, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict."

"Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence;" to which instructions the defendant then and there duly excepted.

The court further charged the jury: "Reputation in his (insured's) family on the part of his father, sisters, and brothers of his death is proper evidence for your consideration, but not the opinion of any one;" to which instructions the defendant then and there duly excepted.

Defendant also asked the court to charge the jury as follows: "If you believe from the evidence that Wm. A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance you will find for the defendant;" which instruction the court refused because the substance thereof was included in the main charge of the court, as follows: "The evidence of witnesses is also before you tending to show that Wm. A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this

evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant;" to which action by the court defendant then and there duly excepted.

Defendant also duly requested the court to give the following instruction:

"The fact that it is possible or probable that the absent party was, at a time and place subsequent to and different from that at which he was last seen, in a place where an accident might have befallen him will not authorize or warrant the indulgence in a presumption concerning his death. The law requires greater certainty and more satisfactory evidence of death.

157 Therefore, unless the jury believe from the evidence that W. A. Hunter, Jr., when last seen was in a position of peril such as that it is more probable that he then and there lost his life than that he extricated himself from such perilous position alive, you must find for the defendant;" which the court refused; to which refusal the defendant then and there duly excepted.

Defendant also requested the court to give the following instruction:

"A warranty is a stipulation in writing in the policy or a condition thereon endorsed, on the truth of fulfillment of which the entire contract depends. Such stipulation may be on the face, margin, or back of the policy, and whether it be material to the risk is not a question for the jury to consider.

Therefore the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued and are herein involved, was at the time he made such application both a farmer and real-estate agent, and unless you so believe you will find for defendant;" which the court refused to give; to which action defendant then and there duly excepted.

All of which requested instructions were presented and said exceptions to the court's charge and refusal of special charges taken on June 2nd, 1900, in open court, at the proper time, before the jury retired to consider of their verdict.

The jury, on the night of Saturday, June 2nd, 1900, returned a verdict in favor of plaintiff, finding amounts of principal, interest, attorneys' fees, and damages separately, but judgment was not then entered, and before the entry of judgment and within the required time, to wit, on Monday, June 4th, 1900, a motion for new trial was duly filed herein by defendant, which, by leave of the court, was duly amended by amendment duly filed on 25th day of June, 1900, on which day said motion was duly presented to the court and then and there overruled; whereupon defendant then and there duly excepted to the action of the court and gave notice of appeal.

That thereafter and before the entry of final judgment, and on the 4th day of July, 1900, plaintiff filed a motion for leave to remit

158 a certain portion of the amount of the verdict, as shown by said motion, to wit, the sum of $3,375.00, service of which motion was then and there duly accepted by defendant; and

Exhibit E. and Exhibit A.

No. 428.
Ins. Co
v.
Metter
p. 159.

Exhibit F-1.

No. 428
Ins Co. } p 160
Mettler

Exhibit 8.

No. 428
Ins. Co.
v.
Mettler
p 161

210 Main St.

Exhibit A-1.

No. 428.
Ino. Co.
v
Metter
p. 162

Exhibit A2.

No. 428
Insco
v.
Metter
p 163

Exhibit A8.

No 428
Ins Co.
v.
Metter
p. 164

thereupon, on said last-named date, the court permitted the plaintiff to remit said sum of $3,375.00; and thereupon, on the 4th day of July, 1900, entered final judgement on said verdict in favor of plaintiff for the sum of $21,550.00; to all of which defendant then and there, on the date last aforesaid, in open court, duly excepted.

This bill of exceptions, at the request of the defendant, is duly allowed and approved by me, the said Edward R. Meek, judge, and made a part of the record in this case, and I hereto set my hand and seal, *nunc pro tunc* (within the time allowed for preparing and filing same, as appears by my orders duly entered for this purpose during the term in the minutes of said court expressly extending the time therefor), on this the 29th day of August, 1900.

EDWARD R. MEEK,
U. S. District Judge.

The foregoing has the following endorsements, to wit:

No. 2118. Jennie M. Mettler *v.* Fidelity Mutual Life Association. Bill of exceptions. Filed 1 day of Sept., 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

(Here follow photographs marked pp. 159, 160, 161, 162, 163, & 164.)

165 *Petition for Writ of Error.*

Filed 24 day August, 1900.

Petition for Writ of Error.

THE UNITED STATES OF AMERICA, }
Northern District of Texas. }

To the honorable justices of the Supreme Court of the United States:

Now comes the Fidelity Mutual Life Association of Philadelphia, by its attorneys, and complains that in the record and proceedings, and also in the judgment in a suit between Jennie M. Mettler, plaintiff, and the said The Fidelity Mutual Life Association of Philadelphia, defendant, tried in the United States circuit court, northern district of Texas, at Dallas, Texas, before the Honorable Edward R. Meek, sitting alone, at the May term, A. D. 1900, and numbered in said court 2118, and in which judgment was rendered against said The Fidelity Mutual Life Association of Philadelphia on, to wit, the 4th day of July, A. D. 1900, manifest error hath intervened, to the great damage of said The Fidelity Mutual Life Association of Philadelphia, your petitioner.

Petitioner shows that it files herewith its assignments of error in said cause.

Wherefore it prays for the allowance of a writ of error in its be-

half and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

JNO. W. WRAY,
PERKINS, GILBERT & PERKINS,
Attorneys for Plaintiff in Error.

Allowed Aug. 28th, 1900.
EDWARD R. MEEK, *Judge.*

The foregoing has the following endorsements, to wit:
No. 2118. Jennie M. Mettler *v.* The Fidelity Mutual Life Association. Petition for writ of error. Filed 24 day of Aug., 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

166 Know all men by these presents that we, The Fidelity Mutual Life Association of Philadelphia, a corporation of Pennsylvania, as principal, and The Fidelity & Deposit Company of Maryland, a corporation of Maryland, authorized to do business in Texas, as sureties, are held and firmly bound unto Jennie M. Mettler in the full and just sum of thirty thousand dollars, to be paid to the said Jennie M. Mettler, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 23d day of August, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the United States circuit court for the northern district of Texas, at Dallas, in a suit depending in said court between Jennie M. Mettler, as plaintiff, and The Fidelity Mutual Life Association of Philadelphia, as defendant, and numbered 2118 in said court, a final judgment was rendered against the said The Fidelity Mutual Life Association of Philadelphia for $21,550.00, and the said The Fidelity Mutual Life Association of Philadelphia having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jennie M. Mettler and her attorneys of record, Mess. W. H. Clark and M. A. Spoonts, citing and admonishing her and them to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., in not exceeding thirty days from 28th day of August, 1900:

Now, the condition of the above obligation is such that if the said The Fidelity Mutual Life Association of Philadelphia shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA. [SEAL.]
J. E. GILBERT, *Its Attorney.* [SEAL.]
FIDELITY & DEPOSIT COMPANY OF MD., [SEAL.]
By C. E. BIRD, *Local Director.*

Sealed and delivered in presence of—
J. B. NABORS, *Agt.*

Approved as a supersedeas writ of error bond.

EDWARD R. MEEK,
United States District Judge. [SEAL.]

75c. revenue stamps attached and cancelled.

[Endorsed:] No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Bond on writ of error. Filed 1 day of Sept., 1900. J. H. Finks, clerk, by Chas. H. Lednum, clerk.

167 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Jennie M. Mettler and Mess. W. H. Clark and M. A. Spoonts, her attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein The Fidelity Mutual Life Association of Philadelphia is plaintiff in error and Jennie M. Mettler is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of August, A. D. 1900, and of the Independence of the United States the 125th year.

EDWARD R. MEEK,
United States District Judge.

Received this writ on Sept. 8, 1900, and executed same on Sept. 10, 1900, at Fort Worth, Texas, in the northern district of Texas, by delivering to M. A. Spoonts, Esq., attorney of record for Jennie M. Mettler, a true copy of this writ, certified by the clerk of the circuit court of the United States for the northern district of Texas, under his seal of office.

Fee, $2.00.

GEO. H. GREEN, *Marshal,*
By WHIT DRYDEN, *Deputy.*

And I certify that I further executed this writ on September 13, 1900, at Dallas, Texas, in the northern district of Texas, by then and there delivering to W. H. Clark, Esq., attorney of record for Jennie M. Mettler, a true copy of this writ, certified by the clerk of the circuit court of the United States for the northern district of Texas, under his seal of office.

Fee, $2.00.

GEO. H. GREEN,
U. S. Marshal, N. Dist. of Texas.

[Endorsed:] Marshal's docket No. 461. Original. No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Citation. Filed 1st day of Sept., A. D. 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy. M. O. D. Mr. M. at Harris'.

168 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Jennie M. Mettler and Mess. W. H. Clark and M. A. Spoonts, her attorneys of record, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein The Fidelity Mutual Life Association of Philadelphia is plaintiff in error and Jennie M. Mettler is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 28th day of August, A. D. 1900, and of the Independence of the United States the 125th year.

EDWARD R. MEEK,
United States District Judge.

We hereby accept service of the within citation.
Sept. 13th, 1900.

M. A. SPOONTS &
W. H. CLARK,
Att'ys for Mrs. Jennie M. Mettler.

[Endorsed:] Copy. No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Citation. Filed 1st day of Sept., A. D. 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy. I hereby certify that the foregoing is a true copy of the original thereof now in my office. Sept. 8th, 1900. Attest: J. H. Finks, clerk, by Chas. H. Lednum, deputy.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

169 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The Fidelity Mutual Life Association of Philadelphia, plaintiff in error, and Jennie M. Mettler, defendant in error, a manifest error hath happened, to the great damage of the

said The Fidelity Mutual Life Association of Philadelphia, plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in -his behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., in not exceeding thirty days from 28th day of August, 1900, being the date of issuance of the citation herein, in the Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1 day of Sept., in the year of our Lord one thousand nine hundred.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of the Circuit Court of the United States
for the Northern District of Texas,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—

EDWARD R. MEEK,
United States District Judge.

[Endorsed:] No. 2118. Jennie M. Mettler *vs.* Fidelity Mutual Life Association. Writ of error. Filed 1 day of Sept., A. D. 1900. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error, 1 day of Sept., 1900.

J. H. FINKS, *Clerk,*
By CHAS. H. LEDNUM, *Deputy.*

170 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record, bill of exceptions, assignments of error, and all proceedings in cause No. 2118, wherein Jennie M. Mettler is plaintiff and The Fidelity Mutual Life Association of Philadelphia is defendant, except that the original writ of error and citation in error and acceptance of service are included therein instead of copies thereof, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand, officially, and the seal of said court, at Dallas, Texas, this the 22nd day of September, A. D. 1900.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

Endorsed on cover: File No., 17,913. N. Texas C. C. U. S. Term No., 428. The Fidelity Mutual Life Association of Philadelphia, plaintiff in error, *vs.* Jennie M. Mettler. Filed September 27th, 1900.

IN THE SUPREME COURT OF THE UNITED STATES.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

vs.

Jennie M. Mettler, Defendant in Error.

October Term, 1900.

No. 428.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

SUR *MOTION TO DISMISS WRIT OF ERROR.*

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION.

The motion to dismiss the writ of error rests upon two propositions asserted by the defendant in error, viz., (1), that this court has no jurisdiction; and, (2), that the writ of error is frivolous.

The second contention rests upon three subpropositions, viz., (*a.*) The protection of the Fourteenth Amendment of the Constitution of the United States cannot be invoked by the plaintiff in error because, as to the State of Texas, it was a foreign corporation; (*b.*) The plaintiff

in error did business in the State of Texas as a foreign corporation, after the Supreme Court of that State had decided that the statute complained of was constitutional. By reason of this fact it is conclusively bound by such decision. (*c.*) The constitutional question raised has already been decided by this court.

As to the first point.

The Record (page 36) shows that on the trial of the cause, before any evidence had been received, the plaintiff in error, then the defendant, excepted to so much of the plaintiff's petition as claimed attorneys' fees and damages under the statute of Texas; and that this exception was based upon its claim that said statute was in violation of the Fourteenth Amendment to the Constitution of the United States. The exception was in these words:—

> Defendant specially excepts to all that part of plaintiff's first amended original petition which sets up and claims attorney's fees and statutory damages in this action, because such attorney's fees and damages are asserted and claimed under the Statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, as well as other provisions of said Constitution and provisions of the Constitution of the State of Texas, and therefore void.

The court overruled said exception. This action and the exception taken thereto appear thus stated on the Record:—

> The court then and there overruled said exceptions, to which defendant then and there, to wit, on the twenty-eighth day of May, 1900, excepted.

The Record shows that the constitutional point was thus promptly raised by the pleadings (Record, page 14), and was renewed at the commencement of the trial.

A question therefore as to whether or not a statute of the State of Texas was in violation of the Constitution of the United States, having been properly raised in the course of the proceedings by the claim by the defendant,

and said question having been ruled upon by the Circuit Court of the United States adversely, the right to appeal directly from such ruling, to this court, follows. In view of the very recent decision by this court in Loeb *vs.* Trustees of Columbia Township, 179 U. S., 472, it would be an impertinence to attempt any argument in support of what has been finally decided by this court. In the Loeb case, after referring to previous authorities, this court, through Mr. Justice Harlan, said:—

> It was the purpose of Congress to give opportunity to an unsuccessful litigant to come before this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention to the Constitution of the United States.

As to defendant in error's second proposition.

(*a.*) It is not necessary to consider the right of a foreign corporation to insist upon doing business within the State of Texas, against any statutory direction by said State. True, the plaintiff in error was a foreign corporation, *qua* the State of Texas; but, with the consent of its authorities, it did business, as appears by plaintiff's statement (Record, page 1), in that State through an agent resident therein. Whilst thus doing business, with the State's permission, it entered into a contract. The question raised by the bill is as to its constitutional rights under such contract. There can be no doubt that after a foreign corporation has been permitted to do business, it is entitled to the protection of the Constitution of the United States, within the foreign State in which the same is done, as fully as though it were a citizen of such State. A foreign State may forbid the doing by it of any business therein, but, if it permits such business, it cannot refuse the enjoyment of rights granted by the Constitution of the United States, which prohibits the deprivation of life, liberty or property, without due process of law, and the denial of the equal protection of the law.

In Santa Clara County *vs.* Southern Pacific Railroad,

118, U. S., 394, this court, through Chief Justice Waite, said:—

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the constitution, which forbids a State to deny to any person within its jurisdiction equal protection of the laws, applies to these corporations. We are of opinion that it does.

In Smyth *vs.* Ames, 169 U. S., 466, where the constitutionality of the Act of the State of Nebraska was raised with regard to certain corporations, some of which were foreign corporations, this court, through Mr. Justice Harlan, said:—

> By the Fourteenth Amendment it is provided that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled.

The cases cited by the defendant in error in her motion to dismiss the writ, which conceded the right of a State to prohibit a foreign corporation from doing business within its borders and imposed conditions upon the transaction of such business therein, have no application. Admitted by the State of Texas within its borders and to do business therein, the plainiff in error became entitled to the protection of the Fourteenth Amendment.

(*b.*) Sayles' Statutes of Texas of 1897, Article 745, in substance provides that when foreign corporations obtain permits to do business in Texas they are then entitled to all the rights and provisions of domestic corporations. This article has been construed by the Supreme Court of Texas in S. A. & A. P. Railway *vs.* Southwestern Tel. & Tel. Co., 93 Texas, 322. In that case the court says:—

> Thus the State adopts the foreign corporation under the law and makes it equal to domestic corporations. Nothing could be more comprehensive.

If the statute of Texas be in violation of the Constitution of the United States, no decision of the Supreme Court of Texas can deprive any litigant of a right to the protection of the Constitution, as interpreted by this court.

The defendant in error argues that a condition precedent to the right of the plaintiff in error to do business within the State of Texas after the same had been decided by the Supreme Court to be constitutional was its future acceptance of the Texas statute. All that can be specifically contended for under this head is that the condition precedent, if there was any, was the acceptance of all valid enactments of the State of Texas not in violation of the Constitution of the United States.

It will be observed that the Texas statute is one which does not relate solely to foreign corporations; but is made applicable to all life insurance companies. How, then, can the statute be construed as a condition precedent to the doing of business within the State by foreign insurance companies?

Even though the statute had been made applicable to foreign corporations only, it would have been subject to the Constitution of the United States, so far as it came within the purview of the Fourteenth Amendment.

In Barron *vs.* Burnside, 121 U. S., 186, it was held that the statute of a State requiring a foreign corporation, as a condition of acquiring a license to do business, to agree not remove any action against it into the Federal Courts, was void. This court, through Mr. Justice Blatchford, said:—

> As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of the privilege secured to it by the Constitution and laws of the United States, the statute requiring a permit must be held to be void.

What was said in the last cited case was approved in Southern Pacific Railroad *vs.* Denton, 146 U. S., 202.

(*c.*) It is contended that the Texas statute is not constitutional because it required a certain class of corpora-

tions, life insurance companies, to pay in addition to what was required by their contract a penalty, with interest, of twelve per centum, viz., $5175, and also $2500 as attorneys' fees.

A similar statute in the case of Phœnix Insurance Company *vs.* Hart has recently been decided by the Supreme Court of Georgia to be in violation of the Fourteenth Amendment.

We assume that unless the point raised by the appellee has been heretofore decided adversely by this court, or unless it be of such easy solution as admits no question, this court will prefer to hear it discussed in the usual way, by oral argument with briefs duly submitted. We do not propose therefore, in this brief, to enter into any elaborate argument; but simply to show that the question is at least an open one, not unattended with difficulty.

In Gulf &c., Railway Co. *vs.* Ellis, 165 U. S., 150, this court ruled that a statute of Texas, giving an attorney fee in addition to the amount of the claim, in all cases of suit against railroads for services or for damages, or for overcharges of freight, or for the killing or injury of stock, was unconstitutional.

It is suggested by the defendant in error that this decision has been overruled, or shaken, by the later case of Atchison, &c., R. R. *vs.* Matthews, 174 U. S., 96. This suggestion, however, fails in view of what in this last decision was said by this court referring to the Ellis case: "We see no reason to change the views then expressed."

In the Matthews' case a statute allowing attorneys' fees in suits against railroads, for damages by fire, was sustained; but, solely on the ground that the statute was a police regulation for the purpose of securing such care on the part of railroads as would prevent the escape of fire from moving trains. This court held that the statute then by it considered was not merely one which imposed a penalty for non-payment of a debt.

In the case now before this Court, the statute of Texas, manifestly, is one which imposes upon life insurance com-

panies, a special penalty for non-payment of their debts. In no sense can it be held to be a police regulation.

It is true that the statute of Texas was held constitutional in Merchants' Life Association *vs.* Yoakum, 98 Fed. Rep., 251. It is only necessary, however, to read the opinion delivered by the Circuit Court of Appeals to see that the question is at least a difficult one, deserving of final consideration and determination by this court.

JOHN G. JOHNSON,
J. E. GILBERT,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED
OCT 31 1901
JAMES H. MCKENNEY
Clerk

In the

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 168.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA,

Plaintiff in Error,

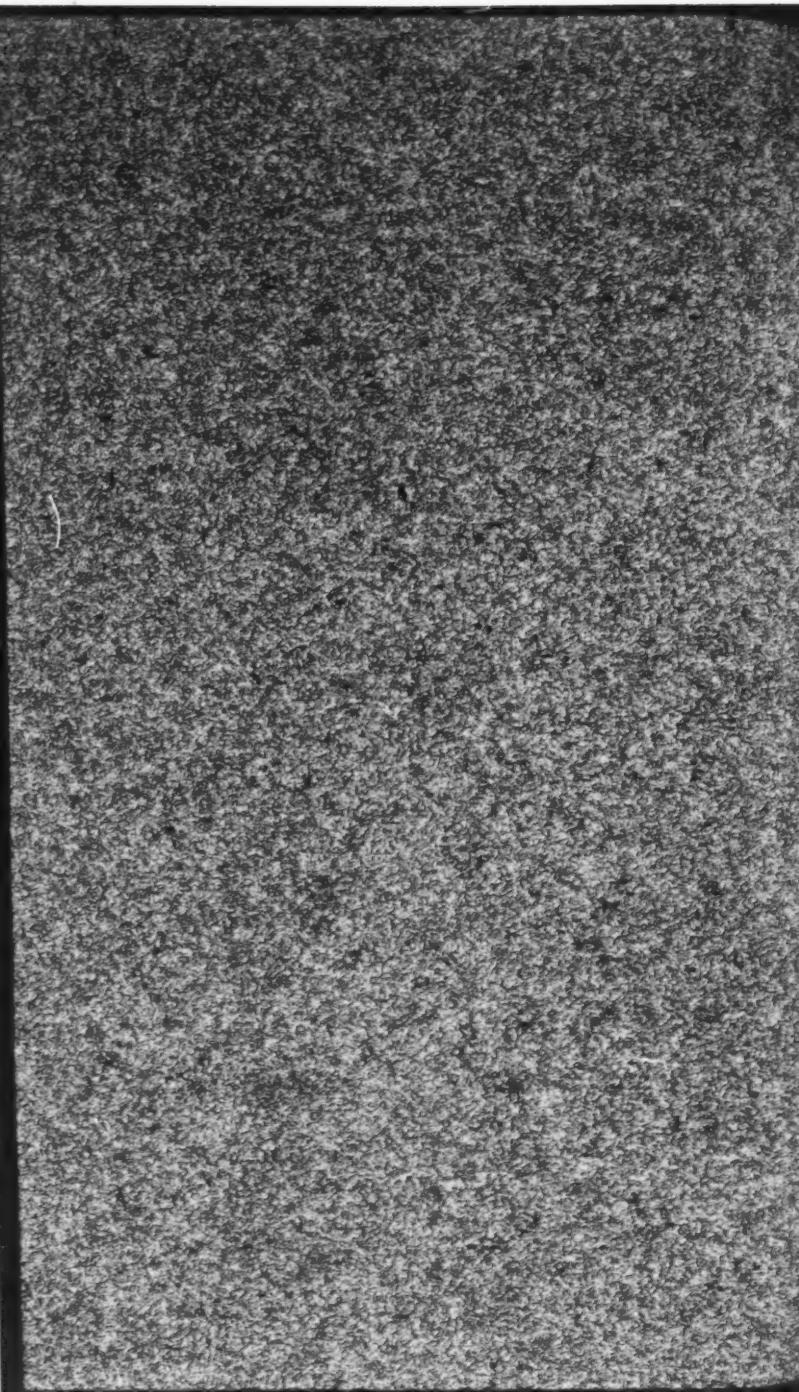
vs.

JENNIE M. METTLER.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR UPON THE CONSTITUTIONAL QUESTION.

By MAURICE E. LOCKE, Dallas, Texas.



Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR, v. JENNIE M. METTLER.	17,913. October Term, 1901. No. 165.

BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR UPON THE CONSTITUTIONAL QUESTION.

PRELIMINARY STATEMENT.

This case presents the question whether Article 3071 of the Revised Statutes of Texas contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Having upon the docket a later case (No. 265) which involves the same question, and being otherwise deeply interested in it as Texas counsel for several life insurance companies, I have been invited by the plaintiff in error to file an argument in its behalf upon that subject. Its regular counsel will of course do all

that is necessary in the way of showing from the record how the question got into the case. Hence, to avoid a needless repetition, I shall assume that it is properly there, and proceed at once to its discussion.

PROPOSITION.

Article 3071 of the Revised Statutes of Texas is violative of the Constitution of the United States, in that it denies to the defendant the equal protection of the laws; and therefore it is not binding upon the defendant.

ARGUMENT.

The plaintiff in error, hereinafter called the defendant, is a Pennsylvania corporation which has long maintained an agency in Texas, where it was sued and served in the present action. It is a life insurance company, and for the purposes of this argument is assumed to be without the classes exempted from the operation of the statute.

The Statute reads as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The circuit court of appeals for the fifth circuit has recently held that this article has no application to accident insurance companies; because their business is neither life nor health insurance, but is some-

thing distinct from them both and so recognized by the legislature.

Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389.

By other statutes, subsequently enacted, two general classes of insurance corporations are exempted from the provisions of Article 3071, to-wit: "mutual benefit organizations doing business in this state through lodges or councils", and "mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations."

R. S., 3092 and 3096; Sup. Council Am. Legion of Honor v. Larmour, 81 Texas 71; Mut. Res. Fund Life Assn. v. Payne, 32 S. W. Rep. 1063.

The state and federal courts in Texas and the circuit court of appeals at New Orleans have repeatedly held that Article 3071 is valid, or that at least it is obligatory upon foreign insurance companies doing business in the state. In the present discussion inquiry will therefore be made, first as to whether the statute is valid upon its own merits, and then as to whether if not so it is nevertheless binding upon foreign corporations.

1.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant dis-

tinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; Magoun v. Ill. Tr. & Sav. Bank, 170 U. S. 283; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

It can not be doubted that the equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress" (Mr. Justice Bradley in Missouri v. Lewis, 101 U. S. 22). Our first inquiry must therefore be answered in the negative, unless there is some real distinction between the obligation of a life or health insurance company to pay its "loss" and the obligation of persons and corporations generally to pay their debts. Furthermore, it must be answered in the negative unless in some way the duty to pay their respective "losses" rests differently upon life and health insurance companies which are without the two excepted classes, and upon accident insurance companies, individual underwriters, and life and health insurance companies within the excepted classes.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

G., C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150; A., T. & S. F. R. Co. v. Matthews, 174 U. S. 96; Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31.

But if it were otherwise, it would be very difficult to point out a satisfactory reason why the duty to pay a life or health insurance claim was more imperative than the duty to pay other debts. The supreme court of Texas never has attempted to do so, though the question has been before it several times. In its first and leading case of Union Cent. Life Ins. Co. v. Chowning, 86 Texas 654, that court rested its decision upon the right of the states to classify persons, and said nothing about the merits of this particular classification. In Fidelity and Casualty Co. v. Allibone, 90 Texas 660, the court merely stated that the question was distinguishable from that involved in the Ellis case. Upon every other occasion, it has been content to deny a writ of error without delivering an opinion, or, without discussing the question, to render a judgment including the penalties. The courts of civil appeals have usually treated the question as closed for them by the decisions of the supreme court. Hence it is that the three below mentioned are the only cases in which any court has attempted to justify the discriminations of the statute.

> New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Orlopp, 61 S. W. Rep. 336.

In the Smith case, the majority held, in an able opinion based upon the decision of this court in the Ellis case, that the statute was invalid; and in a dissenting opinion the first effort was made to defend the classification. The argument there put forth is that the law is a legitimate exercise of the police power; that whenever the legislature finds a business carried on by corporations to be detrimental to the

interests of the people, it may discriminate against that business and deal with it in any manner that wisdom or caprice may suggest; and that "the policy of the state seems to be to hamper, discourage, embarrass, and retard" what is known as the old-line life insurance business. The dissenting justice found sufficient reason for this policy in the fact that certain companies had accumulated very large assets, and in the course of about fifteen years of business in Texas had collected there some twenty million dollars of premiums and paid only about five and a half million dollars of losses; and that the receipts and disbursements of other companies were in like ratio. I can not bring myself to believe that such an argument requires serious refutation in this court.

In the Yoakum case, the circuit court of appeals attributes to the legislature a wholly different purpose in the enactment of this law. It mentions and illustrates the fact that Texas has no statute requiring that warranties shall be construed as mere representations, and none forbidding physicians to testify about disclosures made to them in their professional capacity. It speaks of the length and cost of some litigations, and of the inequality between the position of a skilfully managed corporation and that of an unlettered peasant. From such a line of reasoning, the court deduces the conclusion that "the obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance," and that the classification involved "is therefore not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies." But the legislature did not declare such a purpose, and the law is not an appropriate means of accomplishing it. Certainly it has no bearing on the question

of whether communications to physicians shall be privileged, and no tendency to make less stubborn a litigation once begun. It does not equalize the business ability of the corporation and the peasant; but rather it stimulates the search of corporation counsel for defenses that can be relied upon to defeat unjust claims, regardless of their relation or lack of relation to the actual grounds for declining payment. The fact that Texas has not followed the example of other states in enacting laws of the character indicated, shows that it is not her policy to so curtail the freedom of contract and of judicial investigation. The law can not properly be vindicated as tending very remotely to accomplish a purpose which the state repudiates. It is worthy of note, too, that the circuit court of appeals appears to have changed its opinion as to the purpose of the law. In Fidelity and Casualty Co. v. Dorough, 107 Fed. Rep. 389, it says: "There is little doubt that the statute in question, imposing penalties upon life and health insurance companies which are so combative as to contend for their supposed rights under written contracts containing resolutory and suspensive conditions, and based on warranties, in the courts of the state of Texas, when the right to so contest is denied to no other class of suitors, is penal in its character."

The decision of the court in the Orlopp case was announced by the same justice who had a few years before dissented in the Smith case, and added nothing of importance to the literature of the subject. But the remarkable fact that in the face of numerous adjudications by the appellate courts of the state to the contrary, the district judge in that case ruled that the law was unconstitutional, and placed "an unreasonable and unconscionable penalty on an in-

surance company for daring to avail itself of the privilege of litigating its rights," shows how deep-rooted is the feeling of the bench and bar that those adjudications are wrong.

In the opinion of the majority in the Smith case the object of the statute was said to be "to compel such insurance companies to pay their debts for a death claim within the time provided by the policy"; and in the Walden case (26 S. W. Rep. 1012) its object was said to be "to prevent vexatious delays in the payment of death losses." Aside from the fact that these statements omit all reference to health and endowment insurance, they are manifestly correct; and upon them the law ought to stand or fall. The legislature did not stop to speculate as to whether insurance companies would exercise more care in writing their policies if the courthouse doors were shut against them.

The attempt has been made (British Am. Ass. Co. v. Bradford, 60 Kansas 82) to sustain similar legislation upon the ground that the business of insurance is one clothed with a public interest, and so subject to public regulation. Doubtless it may be subjected to special rules as to those aspects wherein it touches the policy of the state in some way peculiar to itself. The state may always prohibit the making of contracts injurious to the public interest. So, valued policy laws may be justified as tending to prevent reckless insurance with its attendant evils; and standard policy laws, because they make insurance contracts more nearly uniform and certain, and prevent the insertion in them of provisions dangerous to the commonweal. Laws directing that copies of the applications be attached to the policies, laws providing that immaterial breaches of warranty

shall not annul the insurance, laws requiring that notice shall be given of accruing premiums,—all these deal with features of the insurance business that are peculiar to it, and relative to which it may well be specially classed and specially regulated. But in the obligation to perform their contracts and pay their debts, insurance companies do not differ from other natural or artificial persons, and therefore in this regard they ought not to be classed by themselves. When a lawful contract has been made, the public has no interest in it other than that it shall be fulfilled by both parties; and the courts should be equally open to them both for the double purpose of ascertaining their respective liabilities and enforcing the discharge thereof.

The state of Nebraska has a statute, almost verbatim the same as that of Kansas, allowing attorney's fees, to be taxed as costs, in judgments rendered against insurance companies upon policies of fire, tornado or lightning insurance on real property. The supreme court of Nebraska, in considering that law, said in substance that fire insurance companies were notoriously litigious and prone to contest claims upon frivolous pretexts; and that therefore such legislation was justifiable (Lancashire Ins. Co. v. Bush, 82 N. W. Rep. 313). Occasionally one hears a like argument urged in support of the Texas statute. But, in the first place, this argument rests upon a false premise. Life insurance companies have probably less litigation in proportion to the volume of their transactions than any other business institutions. And the percentage of such litigation in which the exempted accident and assessment companies figure is unreasonably large. During the years 1883 to 1899 inclusive, the three leading life insurance com-

panies transacted in Texas a business of over $246,000,000. Volumes 60 to 93 of the reports of the supreme court of Texas show that during the same seventeen years these companies had in that court seven suits relating to losses, in five of which their positions were sustained by the court. Volumes 110 to 178 of the reports of this court show that during the same period they had thirteen cases here, in eleven of which their contentions were approved by the court. I do not know to what incomprehensible figures their totals mounted in the meantime; but at the end of 1899 they had outstanding more than a million policies aggregating more than three billion dollars. In the second place, the statute imposes its penalties indiscriminately upon all the companies therein described, without any regard to their individual character for contentiousness or to the nature of their conduct in particular suits pending. Thus companies ordinarily very compliant are punished for resisting in the best of faith what they suppose to be wrongful demands upon their treasuries. Nor are all litigious people so dealt with, but only a few arbitrarily selected. It is as if the legislature had commanded that all red-haired men (to whom tradition ascribes more than their due share of combativeness) should pay damages and attorney's fees when defeated in their law suits. If litigiousness were a proper basis for classification, all plaintiffs and defendants manifesting such a disposition should be included, and no others. But litigiousness is not a proper basis for classification. It is the boast of all free governments that within their domains the rights of the citizen are secure. He who contends in court for his supposed rights does no wrong; but often he renders to society its highest service at an infinite sacrifice of

his own convenience. Submissiveness was not the spirit that animated the Boston tea party, or the embattled farmers of Lexington who "fired the shot heard round the world." When it becomes the prevailing spirit, we shall have reached that point in our national history "where wealth accumulates and men decay."

It might be supposed that the law was intended to compel the payment of death claims without litigation, because the evidence of the assured would not be available in their support. But it covers sick-benefits and endowments as well as death losses. The plaintiff in life insurance cases always has a great advantage over the defendant because of his more intimate knowledge of the personal history of the assured; and no legislation is needed in this behalf. Moreover, no penalty is imposed upon those who litigate other causes of action with the representatives of deceased persons. The law can not be sustained as devised for the protection of widows and orphans; because it inures to the benefit of administrators, assignees, creditors, and all other holders of death, sick-benefit and endowment claims. If it were argued that life and health insurance policies were intended to provide cash assets for times of emergency, the sufficient answer would be that policies of fire, marine, storm, and accident insurance partake equally of this character, while bank deposits have it to a much greater degree. Yet all these may be contested without incurring any penalty.

It is the duty of every person to pay his rightful debts; but it is not the duty of any one to pay an unjust claim made upon him. On the contrary, as Prof. von Ihering has well demonstrated in his book on The Struggle for Law, we all owe to the commu-

nity the obligation of resisting such demands. This court decided a few years ago upon high grounds of public morals, that a life insurance company could not even by an express promise bind itself to pay to a man's personal representatives a policy matured by his deliberate suicide (Ritter v. Mutual Life Ins. Co., 169 U. S. 139). Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date (Bunyon on Life Assurance, 115). Fraud and self-destruction would be wofully multiplied by such encouragement. Yet this partial and unequal statute goes very far towards driving all life and health insurance companies away from the courts, and making their policies virtually incontestable. For no matter how fully convinced a company may be that a claim made upon it is wrongful, it dares not refuse payment unless it has in hand evidence sufficient to force a verdict from jurymen whom the law tells that it is an unworthy suitor.

The parties to such a contest do not enter it upon equal terms. A sum ranging anywhere from twenty-two per cent. to thirty-five per cent. of the amount in controversy is given to the plaintiff as a prize and exacted from the defendant as a penalty if the plaintiff wins; but if the defendant wins it gets no prize, and the plaintiff pays no penalty.

In the Ellis case, the question was whether a statute allowing to the plaintiff an attorney's fee of $10 was valid. The court held that it was not; but three justices dissented upon the ground that attorney's fees might be allowed as costs. The law now under consideration gives to the plaintiff not only an attorney's fee in such sum as the jury may fix ($2,500 in this case), but in addition thereto twelve per cent. of the policy as punitory damages.

But even if it were possible to distinguish life and health insurance losses from other debts, surely there exists no legitimate ground for the discrimination which this statute makes among those who sustain such losses.

In the first place, the operation of the law is confined to corporations; individual insurers are not affected by it. Individual life underwriting is of course unusual; but it is neither impossible nor unprecedented (Lord v. Dall, 12 Mass. 115). The debts being of the same character, why is the duty of a corporation to pay any more imperative than that of an individual?

In the second place, "mutual benefit organizations doing business in this state through lodges or councils" are exempt from these penalties. The court can take judicial notice of the generally understood fact that there are but few stock companies engaged in writing life insurance in this country. Of the seven largest American companies, only one has any capital stock, the other six being mutual; and the corporate name of the defendant shows that it is of that description. These companies are "mutual benefit organizations." The purpose of their existence is to obtain for their members the benefits of life insurance at actual cost, and not to earn profits for shareholders. The only difference between them and those exempted is that they do not transact their business through lodges or councils. What conceivable relevancy has this distinction to the matter of debt-paying? They are alike in the circumstance that they are corporations issuing life insurance policies and charging premiums therefor. They are competitors in business. Yet in contesting doubtful claims, one risks only the ordinary costs and ex-

penses of litigation, while the other hazards in addition to them the heavy penalties named in this law.

In the third place, "mutual relief associations * * * which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members," are exempt. The only distinction between these associations and other mutual life insurance companies, is that they get their funds from after-death assessments while the others get theirs from advance premiums. This difference may well affect the question as to what is a reasonable time after the death of the assured within which to make the claim mature; but it can not have any proper bearing upon the duty of the respective corporations to pay their debts when they become due.

In the fourth place, according to the decision of the circuit court of appeals, accident insurance companies are not included in either class of corporations named in the statute, and therefore are exempt from its penalties. What possible basis can there be for such a discrimination? The case at bar illustrates its injustice and lack of reason. The plaintiff's claim was that the assured was accidentally drowned in the Pecos River. The defendant's claim was that he was not dead, but that he had fraudulently disappeared; and the circumstances were such as to justify it in litigating the question. Suppose that in addition to the $15,000 of policies sued on, he had had a like amount of accident insurance. If the facts were as claimed by the plaintiff, both this defendant and the accident insurance company would be liable; but if they were as claimed by the defendant, neither would be liable. If both companies contested the matter, and made a common defense, and the two causes were consolidated, so that there should be absolutely

no difference between the plaintiff's just demands against the two; yet upon an adverse verdict, judgment would go against the accident in urance company only for its policies, interest and costs, while this defendant would have to pay these items and more than $4000 of penalties in addition.

It has sometimes been suggested that the legislature meant to impose the penalties upon corporations organized for purposes of profit, and to exempt those of benevolent aim. But this could not have been the legislative intent, even if such a difference would warrant the classification. As above mentioned, it is known of all men that most of the old-line life insurance business of America is done by mutual companies not organized for profit; yet these are subjected to the penalties. It is perhaps equally well known that in this country nearly all the accident insurance is underwritten by stock companies created for the profit of their shareholders; yet these are exempt from the penalties.

The authorities were so thoroughly considered by this court in the Ellis and Matthews cases that any general review of them here would be out of place. The later decisions have contributed little to the discussion. With only a few exceptions they have been founded upon the Ellis case, not merely in recognition of its binding force but with hearty approval of its reasoning. So far as I have observed, no court has yet had occasion to adopt the distinction drawn by Mr. Justice Brewer in the Matthews case. It could have been, but was not, applied to the facts of Paddock v. Mo. Pac. Ry. Co., 155 Mo. 524. In that case the supreme court of Missouri held unconstitutional a statute allowing attorney's fees to plaintiffs in actions to recover damages for in-

juries to stock occurring in consequence of the failure of a railway company to fence its track as required by law. But this distinction has no bearing upon the present controversy, which is governed by the general principles announced in the Ellis case and reiterated in the Matthews case. The supreme court of Colorado, in Davidson v. Jennings, 60 Pac. Rep. 354, and a little earlier the supreme court of Alabama, in Randolph v. Builders' and Painters' Supply Co., 106 Ala. 501, held unconstitutional statutes allowing attorney's fees to the successful plaintiffs in suits to enforce mechanic's liens. In Johnson v. Goodyear Min. Co., 127 Cal. 4, the supreme court of California held invalid a statute giving to employes of corporations liens and attorney's fees in suits to enforce the same.

Article 8012 of the Revised Statutes of Missouri (of 1899) reads as follows: "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding ten per cent. on the amount of the loss, and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict." The court will notice that this statute is less objectionable than the one now under examination. It applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay. Yet it has been held unconstitutional in Williamson v. L. & L. & G. Ins. Co., 105 Fed. Rep. 31. The opinion of Judge Phillips is interesting and cogent, especially that part of it, cover-

ing several pages, in which he refutes the proposition that the enforcement of insurance contracts may come within the police power. Quoting from State v. Greer, 78 Mo. 188, he says that the police power is a system of precaution "'for the prevention of crimes or of calamities,' and police regulations 'are such provisions of the law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and to secure them in the enjoyment of their property. And the police power can be invoked for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such condition, as would be detrimental to the community, and on no other grounds.'" He adds that "The business of insurance is not immoral. It spreads no contagious disease. It does not affect the public health. It does not obstruct the public policy of the state, nor threaten the community with any public calamity or danger."

Section 2140 of the Georgia Civil Code provides that if any insurance company refuse to pay a loss within sixty days after demand, it shall be liable, in addition to the loss, for not more than twenty-five per cent. of its amount and all reasonable attorney's fees; provided it shall be made to appear that the company's refusal of payment was made in bad faith. This statute, like that of Missouri and radically unlike that of Texas, makes no discrimination among insurance companies of different kinds, and punishes them only when they are found to have acted in bad faith. But the supreme court of Georgia, in a recent decision, quoting from numerous authorities and citing the Ellis case as conclusive, held it to be violative of the equal protection clause of the Fourteenth Amendment (Phenix Ins. Co. v. Hart, 112 Ga. 765).

From the foregoing considerations it seems clear to me that the Texas statute denies the equal protection of the laws to life and health insurance companies not exempt from its provisions.

2

Our second inquiry is whether, if the statute be violative of the constitution, it is nevertheless binding upon foreign corporations as a condition of their right to do business in Texas. It has been so held in some cases.

Mutual Life Ins. Co. v. Walden, 26 S. W. Rep. 1012; Merchants' Life Assn. v. Yoakum, 98 Fed. Rep. 251; New York Life Ins. Co. v. Smith, 41 S. W. Rep. 680, dissenting opinion; *contra*, the majority opinion.

The argument is, that Texas had power to condition in whatever way she chose the defendant's right to transact business within her territory; that the statute was enacted before the policy was issued; and that, therefore, by entering the state and issuing the policy the defendant agreed to be bound by the statute.

The defendant is a life insurance company domiciled in Pennsylvania, and had no inherent right to do business in Texas. The latter state could exclude it, or could admit it upon conditions; and for the present it will be assumed that her power to impose express conditions was unlimited.

Article 745 of the Revised Statutes as amended by chapter 119 of the General Laws of 1897 provides a method whereby a foreign corporation may obtain a permit to do business in Texas, and that "such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the

laws of this state on corporations organized under the laws of this state." In S. A. & A. P. Ry. Co. v. S. W. Tel. & Tel. Co., 93 Texas 313, p. 322, the supreme court says of this provision: "Thus the state adopts the foreign corporation upon the terms stated in the law and makes it equal to domestic corporations." While this article does not apply directly to the admission of foreign insurance companies, it shows what is the general policy of the state in dealing with non-resident corporations admitted within its limits.

Article 3071 itself does not distinguish between foreign corporations and those of domestic origin. They stand upon exactly the same plane. As originally enacted (Sec. 9, Ch. 145, General Laws of 1874), it applied only to life insurance companies incorporated elsewhere than in Texas. It was changed to its present form in 1879, becoming Article 2953 of the Revised Statutes of that year; and thus it was made applicable to health insurance companies as well as life, and to domestic corporations as well as foreign.

The terms prescribed for the admission of life and health insurance companies doing business otherwise than upon the assessment plan are found in Articles 3062-3069 of the Revised Statutes. The payment of damages and attorney's fees to persons obtaining judgments against them is not one of the conditions there specified. Article 3071, requiring such payment, is simply a part of the general statutes; and it has no force as a condition binding upon the defendant other than such as it derives from that fact. It is one of twenty articles, 3070-3089, relating to general features of the insurance business. To illustrate, 3070 is a venue law; 3072 provides for the revocation of the license of any life or health company which

fails to satisfy an execution against it within thirty days; 3073 prohibits the issuance of life policies by companies engaged in fire, marine or other insurance business; 3075 limits the amount which fire, marine and inland insurance companies may expose to loss in single risks; 3076 limits their right to own real estate; 3077-3081 provide a remedy for the impairment of the capital of domestic companies; 3083-3085 require annual statements; 3087-3088 regulate the payment of dividends; and 3089 is a valued policy law. Most of these articles relate to all companies doing business in Texas, without reference to their domicile.

By Articles 3048-3049 it is made the duty of the insurance commissioner to issue a certificate authorizing any insurance company to do business in Texas, when satisfied that it has complied with the law and that it has the requisite financial strength. The company is not required to make any promise about paying attorney's fees and damages; and obviously it would have no occasion either to pay them or to become liable for their payment until after it had been admitted to the state and begun to transact business.

Nor have the Texas courts bound this court by an interpretation of the article as one of the terms of admission of foreign companies to the state. The supreme court never has held it to be so, having placed its decisions upon the ground that the law is valid. The court of civil appeals for the second district held in the Walden case, by a bald assumption without reasons given, that Article 3071 was found among the prescribed conditions upon which life insurance companies might do business in Texas, and that a foreign corporation was not in position to complain of these requirements. Afterwards, in the

Smith case, that court discussed and overruled the Walden case, and held that the article was not one of the conditions upon which foreign corporations were admitted, and that it was like any other statute—binding if valid. Probably the Orlopp case (61 S. W. Rep. 336) should be construed as a return by that court to its original doctrine. All the other courts of civil appeals have simply followed the decisions of the supreme court that the law is valid. The five courts of civil appeals in Texas are intermediate courts, whose rulings and interpretations are not authoritative.

Of course foreign corporations entering Texas for the transaction of business thereby subject themselves to her laws. But to draw from this familiar doctrine the conclusion that Article 3071 is binding upon them is a sheer begging of the question. If the article is unconstitutional, it is not law; but is only a fruitless attempt of the legislature to do something which was beyond its power. Suppose that when the defendant entered Texas there had been upon the statute rolls, or in the state constitution, some other article, of superior authority and entirely inconsistent with Article 3071; would any one say that it was bound by 3071, and not at liberty to point out in court the inconsistency of the two? In the words of Chief Justice Taney, "The Constitution of the United States, and every article and clause in it, is a part of the law of every state in the Union, and is the paramount law" (Prigg v. Pennsylvania, 16 Peters 539, p. 628). The Fourteenth Amendment is a part of the law of Texas; and the defendant is claiming here only the right to show that it is inconsistent with Article 3071.

So far as my observation has extended, never, except in these Texas cases, has it been suggested

that a corporation left behind it the protection of the Constitution when it crossed the borders of the state of its origin. At the suit of a New York corporation, the supreme court of Georgia held unconstitutional a statute resembling that now under consideration; and the circuit court in Missouri did the like for an English corporation. The Kansas and Nebraska decisions hereinbefore referred to as sustaining similar legislation do not rest upon any such ground, though the corporations involved were British. In both the leading cases wherein the Texas supreme court declared the law to be valid upon its own merits, the litigating companies were foreign. This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law or of their right to remove causes to the federal courts.

> C., M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418; St. L. & S. F. Ry. Co. v. Gill, 156 U. S. 649; Smyth v. Ames, 169 U. S. 466; Home Ins. Co. v. Morse, 20 Wallace 445; Barron v. Burnside, 121 U. S. 186.

The equal protection clause of the Fourteenth Amendment, by its plain terms, extends to all persons who are within the jurisdiction of the state, and not to those only whose homes are there. That corporations are persons within the meaning of this clause has long been settled.

The case of Fire Association of Philadelphia v. New York, 119 U. S. 110, lends no support to the doctrine that foreign corporations are bound by all the statutes of a state without regard to their constitutionality. The logic of that case seems to me to be this. The Fire Association was a Pennsylvania

corporation, which first entered New York in 1872. At that time there was upon the statute books of New York a law requiring that all insurance companies of other states doing business in New York should pay to it the same tax (when higher than the regular New York rate) which New York insurance companies were required to pay in such states. In 1873 Pennsylvania enacted that every foreign insurance company report each January the amount of premiums received by it in Pennsylvania during the preceding calendar year, and pay a tax of three per cent. thereon as a condition of its right to continue business in the state. The Pennsylvania tax rate of three per cent. therefore became engrafted upon the New York law in 1873. The Fire Association did business in New York by virtue of annual licenses. At the beginning of each fiscal year it occupied the position of a foreign corporation seeking admission to the state for that year. Each time the state met it at the threshold with the proposition that it would be admitted upon condition that it pay into the state treasury three per cent. of its premiums collected in New York, a condition to which there is no constitutional objection. It seems to have accepted the proposition from year to year, and to have paid its tax accordingly. But in 1882 it refused to pay the tax on the premiums of 1881; and to collect this tax the action was brought. When it applied for and accepted its license to do business in New York for the year 1881 (or perhaps 1882), it impliedly agreed to pay the tax; and the court held that it should do so. There was here no room for the operation of the Fourteenth Amendment. It was a lawful contract between the state and the company. The state said to the company, which was then as to this particular

matter a person without its jurisdiction, that in consideration of the payment of a certain sum of money, it would admit the company within its boundaries for one year; and the company accepted the offer. The present case is very different. Here the court is asked to decide that when the defendant has been admitted to the state, and under its license has transacted business with its citizens, and controversies have grown out of such transactions, the state may deny to the defendant the equal protection of the laws in the settlement of those controversies.

The case at bar is wholly unlike that of Waters-Pierce Oil Co. v. Texas, 177 U. S. 28. When the Oil Company entered Texas, the state had a law forbidding certain combinations in restraint of trade, and providing that foreign corporations violating the same should be prohibited and enjoined from doing business there. Obviously, this made abstinence from such combinations an express condition of the right of the Oil Company to transact business in Texas; and the suit was brought to enjoin it from continuing business, on the ground that the condition had been violated. The court held that no question of discriminations was presented by such a record. The situation was somewhat analogous to that found in Doyle v. Continental Ins. Co., 94 U. S. 535. There it was held that although the state of Wisconsin could not prevent a foreign corporation from removing causes to the federal courts, it could lawfully revoke the license of one which had done so.

This case is likewise plainly distinguishable from that of New York Life Ins. Co. v. Cravens, 178 U. S. 389. There it appeared that the legislature of Missouri had enacted that no life insurance policy upon which two annual premiums had been paid should be

forfeited for non-payment of premiums; and that in case of lapse, such a policy should be commuted for paid-up insurance. The general validity of the statute was not questioned. The Insurance Company's contention was, that as this was an interstate contract, the parties thereto could elect to be bound by the laws of either state; that they had chosen to contract under the laws of New York; and that the judgment of the supreme court of Missouri to the effect that they could not do this had deprived it of its freedom of contract without due process of law. In other words, the Insurance Company contended that because it was a foreign corporation, it could do business in Missouri and claim for such business an exemption from the valid laws of that state. The court held that such a claim was without foundation. But in the case at bar, the defendant admits that as to its Texas business it is bound by the laws of Texas; and it only claims the right to test in the appropriate tribunals the question as to whether a certain provision is really one of those laws.

So far in this argument it has been assumed that the state of Texas had unlimited power to name express conditions upon which alone the defendant should be admitted within its borders. But in fact it had not the power to impose conditions "repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Lafayette Ins. Co. v. French, 18 Howard 404; Home Ins. Co. v. Morse, 20 Wallace 445; Bar-

ron v. Burnside, 121 U. S. 186; Blake v. McClung, 172 U. S. 239.

The controlling principle seems to be that when for reasons of public policy an important right is guaranteed to a person by the constitution or laws of the United States, he can not either expressly or by implication bind himself to waive that right. His agreement to do so is invalid, because the interest of the nation forbids it. As was said by Mr. Justice Hunt in Home Ins. Co. v. Morse: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights."

Whatever force there is in the argument that the penalty statute was imposed by the state as a condition of the defendant's right of entry, is derived from the agreement to waive its constitutional guaranty of equal protection thought to be involved in its acceptance of the state's license. For if the effect of the statute is to deny the equal protection of the laws to the defendant while within the jurisdiction of the state, then, considered as a law, the statute is null and void; and it can act, if at all, only as evidence of the terms of an implied contract between the state and the defendant.

So important is the right of access to the courts, that one can not bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him; or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

Home Ins. Co. v. Morse, 20 Wallace 445; Pope Mfg. Co. v. Gormully, 144 U. S. 224; Thomp-

son v. Charnock, 8 Term Rep. 139; Rowe v. Williams, 97 Mass. 163; Del. and Hud. Canal Co. v. Pa. Coal Co., 50 N. Y. 250.

The right to the equal protection of the laws is one guaranteed by the Constitution of the United States; and the essence of that right is the privilege of appealing on equal terms to the courts for protection against unjust demands. It is a right vastly more important to the individual and to the public than that of removing causes from state tribunals to federal. All the reasons which have impelled this court to hold of no effect an express agreement to waive the privilege of removing causes, apply with double force to the proposition that an implied agreement to waive the right of equal protection is nugatory. In this connection I beg to quote from Mr. Justice Harlan's dissenting opinion in Fire Assn. of Philadelphia v. New York, 119 U. S. 110. The court thought his language inapplicable to the facts of that case, but to this discussion it appears exceedingly appropriate. "Can it be," he asks, "that a corporation is estopped to claim the benefit of the constitutional provision securing to it the equal protection of the laws simply because it voluntarily entered and remained in a state which has enacted a statute denying such protection to it and to like corporations from the same state? Is the right to that protection any less valuable or fundamental than the right to remove a suit into the courts of the Union for trial? Will it be held that an express agreement by a corporation not to exercise the latter right is void and not enforcible, but that a local statute denying the equal protection of the laws to a corporation will be upheld, simply because that corporation came within the jurisdiction of the state which assumed to make such denial, and received

from her officers, acting in conformity with her laws, a certificate of its right to transact business there? Will effect be given in one case to what (erroneously, I think) is called an implied agreement to surrender a constitutional right, while an express agreement in the other to surrender a constitutional right is held to be invalid?"

In the first part of this brief I endeavored to show that the statutory classification was arbitrary and unconstitutional. If it be so, the case appears to me to come fairly within the principle of Home Ins. Co. v. Morse and Barron v. Burnside. In that event, the requirement of the statute would not have bound the defendant even if it had been made one of the express terms of admission. *A fortiori*, it does not bind as a general statute not made an express condition of the defendant's right to enter Texas.

Respectfully submitted,

MAURICE E. LOCKE,

Counsel.

No. 165. Of October Term, 1901.

FILED
JAN 30 1902
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Jan. 30, 1902.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

vs.

Jennie M. Mettler, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

[Record No. 17,913.]

BRIEF FOR PLAINTIFF IN ERROR.

T. ELLIOTT PATTERSON,
J. E. GILBERT,
JOHN G. JOHNSON,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error,

vs.

Jennie M. Mettler, Defendant in Error.

October Term, 1901.

No. 165.

[Record No. 17,913.]

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

William A. Hunter was a resident of Reeves County, in the State of Texas. On or about the thirty-first day of October, 1896, the plaintiff in error, the Fidelity Mutual Life Association of Philadelphia, through its agent in Texas, delivered to said Hunter in the State of Texas, three policies of insurance upon his life, each stipulating for the payment of $5000 in case of his death. He paid at the time of the delivery of each of said policies the sum of thirty-two dollars and fifty-five cents, and agreed to pay a like sum semi-annually thereafter upon each policy on the twenty-eighth day of the months of April

and October for a period of ten years from 28th October, 1896.

Each policy (Record, page 37) was stated to be "made "in consideration of the written application of the above-"named insured, which is made a part hereof, a copy of "which is hereto attached."

The application, of which a copy was attached to each policy (Record, page 42), stated, *inter alia*:—

> "*Fourth.*—That my present occupation is real es-"tate and farming, prior was bookkeeping. If more "than one occupation, give all and be specific."

In this application, a copy of which was thus attached, dated 28th October, 1896, Hunter, over his signature (Record, page 44) said:—

> "I hereby agree and bind myself as follows: That "the truthfulness of the statements above made or "contained, by whomsoever written, are material to "the risk, and are the sole basis of the contract with "the said association."

Certain provisions were made part of the policy (Record, page 37), which were entitled:—

> "Privileges and Provisions Referred to in the Body "of this Policy as Conditions Precedent."

Amongst these appears the following:—

> "*First.*—Application. The application, copy of "which is given on third page of this policy, forms "the sole basis of this contract, and it is hereby made "the duty of the insured hereunder to review the "copy of said application and to report promptly to "the president of the said association any misstate-"ments, errors or omissions."

Each policy was made payable to Hunter's sister, Jennie M. Mettler, a widow.

It appeared that Hunter left his sister's house in Pecos, Tex., on the third day of December, 1896, announcing

his intention to go to Mentone, in Loving County, for the purpose of making proof of a section of land in that county alleged to belong to him which he had occupied for three years.

He left in a team, consisting of a wagon and two horses, with some provisions, camping utensils, a gun and camping outfit. He expected to be absent a week or ten days, intending at a later period, after having returned from Mentone, to go back to that place.

Shortly before leaving, he handed to Mr. R. D. Gage, a lawyer, a package of papers sealed in a large envelope, which he asked Mr. Gage to put in a vault. This package contained the policies of insurance.

The sister testified that she did not know the policies had been taken out in her name. There was evidence in contradiction of this averred ignorance.

The sister waited for about fifteen days after the brother's departure, and then, not hearing anything of him, as she swore, caused a searching party to be formed.

This party followed the trail of the wagon and found the same, abandoned, near the banks of the Pecos River, some twenty miles distant from the point of departure at Pecos. One of the horses was found dead. The other was found many miles away, at a later date. There was evidence that some cooking had been done at the place where the wagon had stopped; that some buckets had been filled with water; and that Hunter had slept under a tarpaulin there found.

Foot-tracks, partly identified as those of Hunter, were found, indicating that he had gone to and from the river for water, probably, and also for a supply of brush, the remains of a fire having been found near the wagon. There was also some testimony of foot-tracks near the edge of the river, of an indication of a slipping of one of the feet, and of a broken mesquite root in the bank.

There was a great deal of conflicting testimony as to whether or not there were quicksands in the river; as to its depth; and as to whether or not it was dangerous.

There was testimony offered by the defendant to the

effect that two witnesses, some time after the alleged death, had seen a person alive, identified as Hunter, by photographs.

There was contradictory testimony as to the occupation of Hunter at the time the policies were issued.

Suit was brought upon the policies by the sister, in one of the State courts of Texas, which was removed on the ground of citizenship, by the insurance company, to the United States Circuit Court.

The trial resulted in a verdict for the plaintiff; and although the constitutionality of the Texas statute inflicting penalties was questioned by the defendant, the learned trial judge instructed the jury that it was constitutional, and directed them to add to the amount of their verdict a penalty of twelve per cent. and reasonable counsels' fees.

The jury returned a verdict on the 2d of June, 1900, in favor of the plaintiff (Record, page 19), in these words:—

"DALLAS, TEXAS, June 2nd, 1900.

"We, the Jury, find for the plaintiff and assess her "damages as follows: $15,000 as principal; $2,250 "as interest at rate of 6% from Dec. 2nd, 1897, to "June 2nd, 1900; $5,175, the same being 12% dam- "ages on the amount of $15,000 and interest thereon "at 6%; $2,500 as reasonable attorneys' fees."

The plaintiff remitted, during the term, the sum of $3375 of said $5175 damages, leaving $1800 as part of the twelve per cent. damages and $2500 as "reasonable" attorneys' fees. Judgment was entered for the amount of the policies, with interest, and for the additional sum of $4300.

During the course of the trial, exceptions were taken to the admission of certain evidence which will be referred to more particularly in the argument. Exceptions, also, were taken to the charge of the court in certain respects and to its refusal of certain points presented by the defendant.

The constitutionality of the Texas statute authorizing the collection of the attorneys' fees and of the penalty of twelve per cent. was contested in the pleadings and at the trial. The learned trial judge was specifically asked to declare the same unconstitutional. He held, however, that it was constitutional, and he directed the jury to find for the plaintiff an additional amount, which would include the twelve per cent. and reasonable attorneys' fees, if they should find in favor of the plaintiff.

An appeal was taken to this court, from the Circuit Court of Texas, because of the fact that a constitutional question was involved. The case being therefore upon appeal in this court, all errors in the court below are here reviewable.

ARGUMENT.

We will discuss four propositions:—

I. THE STATUTE OF TEXAS, WHICH DIRECTS THAT LIFE AND HEALTH INSURANCE COMPANIES, WHO SHALL DEFAULT IN PAYMENT OF THEIR POLICIES, SHALL PAY TWELVE PER CENT. DAMAGES, TOGETHER WITH REASONABLE ATTORNEY'S FEES, IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT ERRED IN ADMITTING THE TESTIMONY OF A REPUTE IN THE FAMILY OF HUNTER CONCERNING HIS DEATH AND THE MANNER THEREOF.

III. THE COURT ERRED IN NOT CHARGING, AS REQUESTED, THAT IF HUNTER AT THE TIME OF MAKING APPLICATION FOR INSURANCE WAS NOT A FARMER AND REAL ESTATE AGENT, THERE COULD BE NO RECOVERY.

IV. THE COURT ERRED IN NOT CHARGING THE JURY TO FIND A VERDICT IN FAVOR OF THE DEFENDANT BECAUSE OF THE FAILURE TO OFFER SUFFICIENT EVIDENCE FROM WHICH AN INFERENCE OF HUNTER'S DEATH COULD BE DRAWN.

I. The statute of Texas, which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent. damages, together with reasonable attorney's fees, is in violation of the Constitution of the United States.

The statute of Texas reads thus (Record, page 30):—

> "In all cases where a loss occurs and the life or "health insurance company liable therefor shall fail "to pay the same within the time specified in the "policy after demand made therefor, such company "shall be liable to pay the holder of such policy, in "addition to the amount of the loss, twelve per cent. "damages on the amount of such loss, together with "all reasonable attorney's fees for the prosecution "and collection of such loss."

This statute puts upon certain kinds of insurance companies which insist upon their constitutional right of appeal to courts of justice, a huge financial imposition in the way of penalty and of payment of large fees.

In the present case, an insurance company defended a claim for $15,000, because of death, alleged to have occurred within thirty-five days of the payment of a premium of $100. No mutual life insurance company, in the slightest degree regardful of its duty to its members, could have paid, voluntarily, the amount demanded. All the circumstances pointed to a plot to obtain a large insurance after a disappearance, rather than after an actual death.

We submit that there is no possible ground upon which, in accordance with the Constitution of the United States, life and health insurance companies can be mulcted in large penalties if they demand a judicial determination of their liability to pay the amounts of their policies, whilst all other kinds of insurance companies and all other corporations and individuals, may, without penalty, obtain such determination. There is no reasonable ground for

any classification justifying the penalties imposed by the Texas statute, upon certain kinds of insurance companies.

It is idle to urge that the plaintiff in error, a foreign corporation, agreed as a condition to permission to it to do business in Texas, that it would accept liability for the penalties imposed by the statute. If the law we are considering is constitutional, it affects alike domestic and foreign corporations. No condition was imposed upon the plaintiff in error, or accepted by it, obliging a specific acknowledgment of its validity. The plaintiff in error was permitted to do business in the State of Texas. The business by it there transacted, thus permitted, gave to it rights and subjected it to duties, the extent of which must be ascertained by valid laws.

We submit that the decision of this court in Gulf Ry. Co. *vs.* Ellis, 165 U. S., 150, is conclusive of the question here submitted, and that there is nothing in Atchison R. R. *vs.* Matthews, 174 U. S., 96, which diminishes the applicability of the Ellis case.

In the Matthews case, the statute allowing attorney's fees in suits against railroads for damages by fire, was sustained on the ground that it was a police regulation for the purpose of securing such care on the part of the railroads as would prevent the escape of fire from moving trains.

In the present case, the penalties are imposed whenever insurance companies of a certain class demand that the extent and fact of their liability under a contract, the legality of which is conceded, shall be determined in the ordinary course of judicial procedure, by judicial tribunals.

What proper police regulation can there be such as will put a penalty, not imposed upon litigants generally, upon certain litigants because they ask for a trial?

The question involved under this head has been discussed in the brief, now part of the records, filed in opposition to the motion to dismiss the writ of error. We rest the argument of the same upon the briefs heretofore filed.

II. The court erred in admitting the testimony of a repute in the family of Hunter, concerning his death and the manner thereof.

The plaintiff, the sister of Hunter (Record, page 48), under objection which was overruled, and under exception, was permitted to answer this question:—

> "Q. State what is the general reputation in the "family—your father, brothers and sisters—as to "the death of your brother, W. A. Hunter?"

Her answer was:—

> "My father, brothers and sisters all believed my "brother to be dead."

Under like objection overruled, and under exception taken, the same witness was permitted to testify (Record, page 49):—

> "That the family believed he was drowned in the "Pecos River out in the West, and that this family "belief has existed ever since I wrote them about it."

The letter to which the witness referred was one she recognized as having been written by herself, addressed to her father, dated December 30th, 1896, written, she thought, after she had returned from the camp where her brother's outfit had been found.

The depositions of various members of the family, seven in all, including the father, sisters and brothers, were taken at Homer, Ohio, where they resided.

They testified that Hunter had lived at Homer until he went to Texas, about 1885, and that after that time, a family correspondence had been kept up regularly, until the time of his disappearance.

These witnesses (Record, page 56), under objection, overruled and under exceptions taken, were permitted to answer the following question:—

> "Q. If you know, state what is the general repu- "tation and repute in the family as to whether said

"William A. Hunter is dead or alive? How do know "the general repute in the family as to whether he "is dead or alive? If you know, what is the general "repute in the family as to what has become of said "William A. Hunter? As to the 'family' who do you "mean?"

Their answer was:—

"That the general repute in the family is that "William A. Hunter, Jr., is dead. He is supposed "by the family to have drowned in the Pecos River; "that is the general belief. By the 'family' is meant "the father and the brothers and sisters of William "A. Hunter, Jr."

In a suit brought by one of the family, the sister, to recover $15,000 of insurance upon the life of a brother, the fact of death, entitling to the money, being the sole issue, the family were permitted to testify to a repute not only as to his death, but as to his death by drowning in the Pecos River. One of the "family" who testified to this repute, was the plaintiff. The rest of the "family," who thus testified, were persons who do not appear to have seen the alleged dead brother for eleven years, nor to have had any communication with him saving by correspondence, nor to have known anything about him excepting that he had ceased to correspond with them, after they had been informed by a letter from the plaintiff, of facts connected with his disappearance. Is it possible to establish the fact of a death by "repute in a family," especially in a family situated as was that of Hunter, where such repute enures directly to the family benefit?

Was Hunter alive or dead? This was an issue of fact. The opinion concerning the same, entertained by persons who knew nothing as to the fact; who had no opportunity of arriving at a correct determination thereof, but who were interested in its establishment, was utterly immaterial. It did not, in the slightest degree, conduce to a correct determination of the issue.

The authorities condemn, without exception, the admissibility of evidence such as was received in this case.

In the Texas courts, the question we are considering has been decided adversely to such admissibility.

In Johns *vs.* Northcutt, 49 Texas, 444, decided in 1878, which was an action to try title to land, one of the plaintiffs, who was a member of the family, was permitted to testify, over objection and exception, that, by correspondence with certain other living members of the family, named by him, he had heard and believed that certain other parties named by him were heirs, &c. On appeal this was held to be error, the court saying (page 455):—

> "The testimony here in question is undeniably "merely hearsay. Such evidence is, of course, in "general inadmissible. Appellees insist, however, "that hearsay is admissible to prove pedigree; but "still it must be admitted this character of testimony "is not generally admissible, even for this purpose. "But still its admissibility for the proof of pedigree is "restricted and limited to the hearsay or declarations "of a particular character of persons, or such as are "made and testified to under special and particular "circumstances. The testimony objected to, plainly, "upon its face, does not come within the exceptions "to the general rule, that hearsay evidence is not "admissible."

In Schwarzhoff *vs.* Necker, decided in 1880 by the Texas Commission of Appeals, reported in 1 Unreported Cases, 325, which was an action to assert title to land against one Julius Harms, in which the daughter of his divorced wife intervened to claim an interest alleged to have vested in her by reason of the death of her mother, the issue was as to the admissibility of certain evidence offered to prove the mother's death. The syllabus correctly summarizes the point decided as follows:—

"Testimony of witnesses, one that 'the last I heard
" 'of Mrs. Harms was during the war, after the di-
" 'vorce. I understood that she lived with a man
" 'named Eisemann in 1863 or 1864 in Galveston.
" 'There was a report that she was dead, but I can-
" 'not say anything about her. I think I heard the
" 'report of her death several years ago;' another
"that 'The last I heard of Mrs. Harms was during
" 'the late War.' 'I never heard of Mrs. Harms after
" 'she left old Mr. Harms; that is, since eighteen
" 'or twenty years;' and another (Julius Harms) that
" 'I have heard nothing from my former wife since
" 'the divorce. Anna Necker (the intervenor) told
" 'me her mother was dead; that a report of her
" 'death reached her; that she died not long since.
" 'I never inquired as to my former wife in Galves-
" 'ton;' is insufficient to prove the death of a party."

In Hurlburt's Estate, decided by the Supreme Court of Vermont in 1896, reported in 35 Atl. Rep., 77, the syllabus reads:—

"1. 'General reputation in the family,' which is "admissible in matters of pedigree, or to establish "the facts of birth, marriage or death, is confined "to declarations of deceased members of the family, "and family history and traditions handed down by "declarations of deceased members, in either case "made *ante litem motam*, and originating with per-"sons presumed to have competent knowledge of the "facts stated; and evidence of the opinion or belief "of the living members of a family as to the death of "another member is not within the rule, and is in-"admissible.

"2. A person's death cannot be established by "general reputation among his living friends and "acquaintances."

The opinion in this case considers most elaborately the decisions and the reasoning involved in the subject.

In Haines *vs.* Guthrie, decided by the Court of Appeals in 1884, reported in 13 Q. B. Div., 818 (L. R., 1883-1884), the syllabus reads:—

> "The rule which admits hearsay evidence in pedi-
> "gree cases is confined to the proof of pedigree, and
> "does not apply to proof of the facts which consti-
> "tute a pedigree, such as birth, death and marriage,
> "when they have to be proved for other purposes.
> "Therefore, in an action for goods sold, to which
> "the defense was infancy, an affidavit stating the date
> "of the decedent's birth, which had been made by
> "his deceased father in an action to which the plain-
> "tiff was not a party, was held inadmissible as evi-
> "dence of the age of the defendant in support of his
> "defense."

The case of Scott *vs.* Ratliffe, 5 Peters, 84, was one of pedigree. Testimony was there given by a witness to the effect that some twenty years earlier, at a certain place, she had been told of a certain death. All this occurred long before the fact of death became important to the people who spoke of the death. It has no bearing upon the present question. In connection with this decision, that of Stein *vs.* Bowman, 13 Peters, 209, which speaks of the danger of offering proof of declarations after a controversy had arisen, should be read.

In Whittuck *vs.* Waters, 19 English Common Law Reports, 561 (4 Carr. & Payne, 375), the syllabus reads:—

> "In an action for use and occupation by the re-
> "versioner, against a person who had been tenant
> "for years, determinable on three lives; a register
> "of burials of a Wesleyan chapel, is not admissible
> "to prove the death of one of the *cestuis que vie;*
> "nor is the evidence of a witness who heard in the
> "family that another of the *cestuis que vie* was dead.
> "*Semble*, that a copy of an inscription on a tombstone
> "in the burial ground of a Wesleyan chapel is also
> "not evidence for this purpose."

In the present case, suit was brought within a year of the alleged death. The testimony of the witnesses was taken in about two years thereafter. It was not possible to establish a "repute." The alleged "repute" was simply an opinion concerning a fact which could only be found by a jury—an opinion which, so far as it did not rest upon evidence, was without foundation. The family believed, without knowledge of anything else than that he had not written to them for several years and had disappeared, under circumstances stated to them by the sister, that he was dead. Grant that the jury might, from the evidence, reach a conclusion of death, would their conclusion be helped by evidence that certain persons had reached a similar conclusion, from similar facts? What special ability to pass upon the fact of death, existed in the "family"?

III. The court erred in not charging as requested, that if Hunter, at the time of making application for insurance, was not a farmer and real estate agent, there could be no recovery.

The learned trial judge refused to charge (Record, pages 32, 118) as requested by appellant, in these words:—

> "A warranty is a stipulation in writing in the "policy thereon indorsed, on the truth of fulfillment "of which the entire contract depends. Such stipu- "lation may be on the face, margin or back of the "policy, and whether it be material to the risk is not "a question for the jury to consider. Therefore, the "jury must believe from the evidence that W. A. "Hunter, Jr., at the time of making application for "insurance to defendant, on which policies of insur- "ance were issued and are herein involved, was at the "time he made such application both a farmer and "real estate agent, and unless you so believe you will "find for the defendant."

The defendant proved that Hunter was practically without occupation, settled habitation or residence; that long prior to his disappearance he had forfeited, by his failure to pay the first installment of interest on the purchase price, the entry which he had made on the public domain; and that (Record, page 82) his last occupation, prior to its application, was in the employment of a photographer.

The jury, under the evidence, might, therefore, fairly have found that at the time of his application his occupation was not real estate and farming. The defendant was entitled to an instruction to the effect that if such was not his occupation, the application was false and there could be no recovery. Such instruction was asked for and was refused.

It does not appear that there is any special statute in Texas upon the subject of representations or warranties or the effect thereof.

In the present case, as we have seen, the insured stipulated that the statements in the application were material to the risk, were the sole basis of the contract, and were true. He further agreed that the application, of which a copy was attached to the contract, formed the sole basis of the contract. The policy itself, in the body thereof, stated it was made in consideration of the written application which was a part thereof, a copy being attached.

The plaintiff sought to bring the contract under the Pennsylvania law. In view of the fact that it was delivered by a Texas agent, in the State of Texas, to Hunter, we contend it was made under the Texas law; but we are quite ready to concede the contention of the plaintiff, that it was made under the law of Pennsylvania.

In Lutz *vs.* The Metropolitan Life Insurance Company, 186 Penna., 527, the syllabus reads:—

> "In an action upon a life insurance policy where "the undisputed evidence is that the insured in his "application had falsely stated that he never had any "illness, and had not consulted a physician, it is error

"for the court to submit the question of the materi-
"ality of the answers in the application to the jury.
"Where it is doubtful whether the matter is material,
"the question of materiality must be submitted to
"the jury, but where the answer is false and the mat-
"ter involved is palpably and manifestly material to
"the risk, as in answers as to health, the Act of June
"23d, 1885, P. L., 134, has no application."

In Smith *vs.* Northwestern Mutual Life Insurance Company, 196 Penna., 314, the syllabus reads:—

"No principle of law will enable a party who guar-
"antees a fact upon which a contract for insurance
"is based, which fact is afterwards found not to ex-
"ist, to enforce the contract. He agrees to answer
"for the truth of the fact, and cannot escape on the
"ground of his mistake as to its existence.

"Where an applicant for life insurance warrants
"that his answers shall be true, full and fair, and in
"answer to a question states that he had not since
"childhood had the disease or disorder of 'spitting
" 'or raising of blood,' while the uncontradicted evi-
"dence was that he had spit blood, was frightened
"and had consulted a physician about it, the answer
"being, if not untrue, not full and fair, and, being
"material to the risk, avoided the policy, and in an
"action upon it the trial judge committed no error
"in giving binding instructions for the insurance com-
"pany."

In New York Life Insurance Co. *vs.* Fletcher, 117 U. S., 519, the syllabus reads:—

"If an applicant for life insurance is required to
"answer questions relating to material facts in writ-
"ing and to subscribe his name thereto as part of
"the application upon which the policy is issued, it
"is his duty to read the answers before signing them,
"and it will be presumed that he did read them.

"If a policy for life insurance on which premiums

"have been paid is void by reason of untrue repre-
"sentations as to material facts in the application,
"made without design on the part of the applicant,
"the only recovery which can be had on the policy
"after the assured's death is for the premiums paid
"on it."

In Hubbard *vs.* Mutual Reserve Fund Life Association, decided in 1900 by the Circuit Court of Appeals of the First Circuit, 100 Fed. Rep., 719, the syllabus reads:—

"Where an application for life insurance recites
"that the answers and statements in this application
" 'are warranted to be full, complete and true,' and
"that if they are not so, the policy issued thereon
" 'shall be null and void,' and also stipulates that
"the answers which it contains are parts of the
"policy, the policy and the application together con-
"stitute the written agreement of insurance, and both
"the insured and the beneficiary under the policy are
"bound by the warranty of the answers and state-
"ments in the application, although some of the ques-
"tions and answers are of such a character as to
"preclude the idea that the parties intended to make
"them the subject of warranty."

This court, in Ætna Life Insurance Co. *vs.* France *et al.*, 91 U. S., 510, held:—

"Where a party, in order to effect an insurance
"upon his life, agreed that if the proposal, answers
"and declaration made by him—which he declared
"to be true, and which were made part and parcel
"of the policy, the basis of the contract, and upon
"the faith of which the agreement was entered into—
"should be found in any respect untrue or fraud-
"ulent, then, and in such case, the policy should be
"null and void—*held*, that the company was not liable
"if the statements made by the insured were not true.

"The agreement of the parties that the statements
"were absolutely true, and that their falsity in any

"respect should void the policy, removes the ques-
"tion of their materiality from the consideration of
"the court or jury."

In Jeffries *vs.* Life Insurance Company, 22 Wallace, 47, the syllabus reads:—

"Where a policy of life insurance contains the fol-
"lowing conditions, to wit:—

" 'This policy is issued by the company, and ac-
" 'cepted by the assured, on the following *express*
" '*conditions and agreements, which are a part of the*
" '*contract of insurance*:—

" '*First.*—That the statements and declaration
" 'made in the application for said policy, and on the
" 'faith of which it is issued, *are in all respects true,*
" 'and without the suppression of any fact relating
" 'to the health or circumstances of the insured *affect-*
" '*ing the interest of the company.*'

"And the further condition:—

" 'That in case of the violation of the foregoing
" 'condition, * * * this policy shall become *null*
" '*and void.*'

"Any answer untrue in fact, and known by the ap-
"plicant for insurance to be so, voids the policy,
"irrespective of the question of the materiality of the
"answer given, to the risk."

In Kansas Mutual Life Insurance Company *vs.* Pinson, decided by the Supreme Court of Texas in 1901, 63 S. W. Rep., 531, the decedent, on applying for the life insurance policy on which the suit was brought, signed an application in which was the following:—

"I also agree that all the foregoing statements
"and answers, as well as those that I make, or shall
"make, to the company's medical examiner, in con-
"tinuation of the application, are by me warranted
"to be true, and are offered to the company as a con-
"sideration of this contract."

In his answers on his medical examination he stated he had five living sisters, aged respectively fifty-two, fifty,

forty-seven, forty-five and thirty-six years, and signed at the foot of it the following:—

> "I hereby certify that I have read the foregoing, "and my answers to the questions and statements "are true and correctly recorded."

The policy recited that it was issued:—

> "In consideration of the statements and agree- "ments in the application for this insurance which "are made a part of this contract, and in further con- "sideration of the payment of premiums."

The sisters were in fact aged only forty-nine, forty-six, forty-four, thirty-six and thirty-three years, respectively.

The case was certified from the Court of Civil Appeals upon a question whether this discrepancy of age forfeited the policy.

The Supreme Court held that the provisions recited constituted a warranty, and that (quoting Goddard *vs.* Insurance Co., 67 Tex., 71):—

> "If they did, the law exacts a compliance with their "terms, according to their true intent and meaning, "whether material or not, or whether known to the "assured or not, if he had the opportunity, and it "was his duty, under the circumstances, to acquaint "himself with them."

The court accordingly answered the question certified that this discrepancy did cause a forfeiture of the policy.

IV. The court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn.

We might not find it necessary to deny, in the case of a man having no motive to disappear, that a jury might be allowed to find the fact of his death from a long-con-

tinued disappearance, under circumstances tending to establish the fact of imminent peril at a prior time.

In the present case, however, policies of insurance were taken out by a person with no visible means of support, which obliged him to pay $200 per annum. These policies were made payable to a sister, who did not appear to be dependent upon him. Within about thirty-five days after their delivery to him, he disappeared. There was a very apparent motive for the disappearance; for, if, without actual death, it would be accepted as an equivalent therefor, his sister, possibly he, would profit to the extent of $15,000.

The error in the proceedings in the court below consisted in the trial judge allowing the jury, despite the obvious motive to disappear, to infer death from the fact of disappearance, without calling their attention to the fact that it was quite as likely to have resulted from a desire to obtain the insurance money, as from actual death.

Would the circumstances connected with the camping at the river, the abandonment of the camp and the footmarks, have been sufficient to establish death?

If not, did the continued subsequent non-appearance for several years, where there was a motive not to appear, supply any corroborative evidence?

Undoubtedly there had been an abandonment of the camp. If Hunter desired to disappear, there would have been such abandonment. The footmarks near the river, what was supposed to be an indication that a foot had slipped, and a broken mesquite root, were utterly inadequate to establish the fact of drowning, above all in a river as shallow as was the Pecos.

If Hunter had entered into a plot to collect from the defendant, through an insurance upon his life, the sum of $15,000, by disappearing, he would have done precisely what was done in the present case.

In no way were the jury warned of the danger of drawing a wrong inference from the facts presented because

of the existence of a motive to give a false presentation and color.

All the points presented to the learned trial judge by the defendant tending to elicit such warning were refused.

He was asked (Record, page 33) to charge:—

> "If you believe from the evidence that William A. "Hunter, Jr., has been seen or heard from, by any "one, at any time since his disappearance, you will "find for the defendant."

This point was refused because, as he told the jury, he had covered the same in his general charge. Testimony had been given by two witnesses, Wallace and Littler, that each had seen Hunter, identified by photographs, alive, after the alleged disappearance, one at one place and the other at another, far distant. In the general charge the learned trial judge said (Record, page 117):—

> "The evidence of witnesses is also before you tend- "ing to show that William A. Hunter has been seen "on two occasions and at two places since the date "of his alleged disappearance on December 4th, "1896. You should carefully consider this evidence "in relation to his having been seen since the date "of his alleged disappearance, and if you believe from "the evidence that he was seen by the witnesses who "have testified to this, then, of course, it would be "your duty to find for the defendant."

There can be no doubt that the defendant was entitled to an affirmance of its point, viz., that if Hunter had been seen or heard from by any one, the verdict should be in its favor. The only justification of a refusal of the point was that it had been charged, in substance, at least, elsewhere.

In the general charge, however, the jury had been instructed that they should find for the defendant, only if they believed he had been seen by the witnesses who had testified to that fact. Two witnesses having so tes-

tified, they were practically told that if they believed one had seen him and the other had not, their verdict should not be for the defendant.

The learned judge also refused (Record, pages 34, 118) another point in these words:—

> "The fact that it is possible or probable that the "absent party was at a time and place subsequent "to and different from that at which he was last "seen in a place where an accident might have be- "fallen him, will not authorize or warrant the indul- "gence in a presumption concerning his death. The "law requires greater certainty and more satisfactory "evidence of death. Therefore, unless the jury be- "lieve from the evidence that William A. Hunter, Jr., "when last seen was in a position of peril, such as "that it is more probable that he then and there "lost his life than that he extricated himself from "such perilous position alive, you must find for the "defendant."

Was not the defendant entitled to have the jury told it was not sufficient to ground a presumption of death, to show that the absent party had been last seen at a place where an accident might have befallen him, but that the law required greater certainty and more satisfactory evidence, of death?

If, where last seen, Hunter was in a position of peril such as made it more probable that he had extricated himself than that he had lost his life, there was no presumption he then and there died. The jury ought to have been told, that under such circumstances, they should not draw such a presumption.

Again. The learned trial judge (Record, pages 34, 117) was asked to charge:—

> "The law presumes that the life of any person "continues for seven years after the last time he was "seen alive or heard from. The death of a person "may be established by circumstantial evidence, but

"in such cases the circumstances proven must ex-
"clude, to a reasonable and moral certainty, the fact
"that such person is still living, and each fact in the
"chain of facts from which the death of the party is
"to be inferred must be proved by competent evi-
"dence and by the same weight and force of evi-
"dence as if each one were the main fact in issue,
"and all the facts proven must be consistent with
"each other and consistent with the main facts in
"issue—that is, the death of the party. Unless, there-
"fore, the plaintiff has established the death of Will-
"iam A. Hunter, Jr., by the certainty hereinbefore
"set forth, the jury should find for the defendant."

Was not the defendant entitled to demand proof of circumstances such as excluded a reasonable and moral certainty that Hunter was still living?

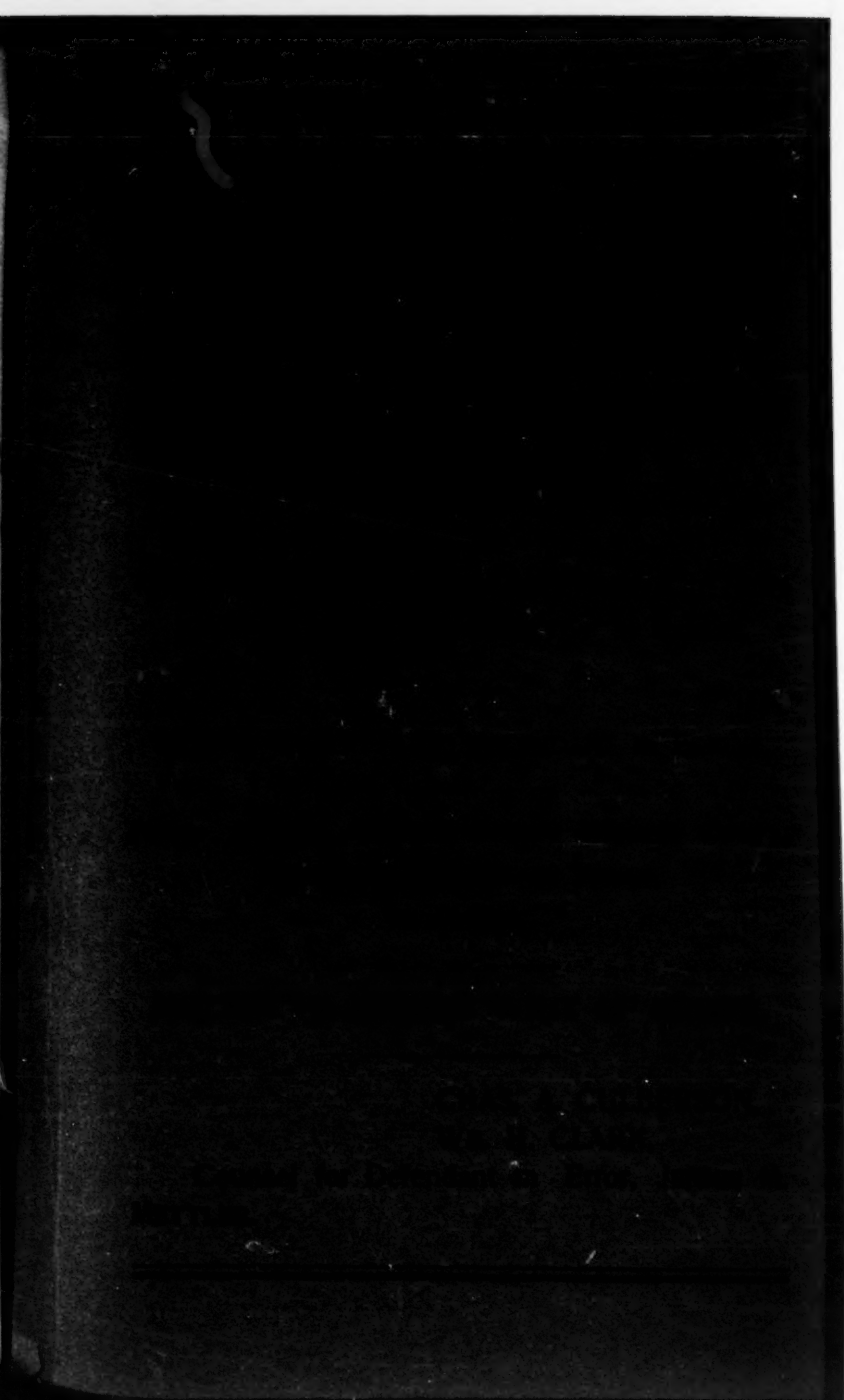
If shown, when last heard from, to have been in a position of peril not such as to exclude a reasonable and moral doubt that the peril resulted in his death, was the fact of his death established?

The learned trial judge (Record, pages 32, 117) charged thus:—

"If from the evidence in this case you should come
"to the conclusion that Hunter has been continu-
"ously absent since December 3d, 1896, without be-
"ing heard from by his relatives and friends, it should
"have due weight with you in arriving at your ver-
"dict. * * * Absence alone cannot establish the
"death of Hunter, for the law presumes an individ-
"ual shown to be alive and in health at the time of
"his disappearance continues to live. While the
"death of Hunter is not to be presumed from ab-
"sence alone, yet it is a circumstance which should
"be taken into consideration with all the other evi-
"dence in the case and the conclusion of life or death
"arrived at from all the facts and circumstances, in-
"cluding his continued absence."

We submit that this portion of the charge was inadequate, because it failed to call the attention of the jury to the fact that a motive existed for Hunter's continued absence. The non-appearance of a person having no motive to disappear, may lend corroboration to circumstances tending to prove a prior death. Such non-appearance, however, where there is such motive, affords no corroboration whatever of anything other than of a desire to materialize the motive into money.

JOHN G. JOHNSON,
J. E. GILBERT,
T. ELLIOTT PATTERSON,
For Plaintiff in Error.



No. 428.

In the Supreme Court of the United States.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

—VS.—

JENNIE M. METTLER, DEFENDANT IN ERROR.

Error to the United States Circuit Court, Northern District of Texas, at Dallas.

MOTION TO DISMISS WRIT OF ERROR.

Comes now Jennie M. Mettler, the defendant in error, a *feme sole,* in the above entitled cause, by her counsel, appearing in that behalf, and moves the Court to dismiss this writ of error, for the following reasons, to-wit:

I.

This Honorable Court has not jurisdiction of the cause. The defendant in error, as plaintiff below, a resident and a citizen of the state of Texas, filed this suit on the 2nd day of December, 1897, in the District Court of Dallas County, 44th Judicial District of Texas, to recover judgment against the plaintiff in error, defendant below, a corporation created and operated under and by virtue of the laws of the State of Pennsylvania, upon three certain policies of insurance of $5,000.00 each, issued simultaneously by plaintiff in error on the 31st day of October, 1896, insuring the life of William A. Hunter, brother of the defendant in error, for her benefit, the policies being payable to her.

It is alleged by the defendant in error that her brother, William A. Hunter, was drowned on December 4th, 1896, in a quick-sand river—the Pecos —of Texas, and that his body was never found. (Record pp. 2, 9,). On the 4th day of January, 1898, the plaintiff in error filed in the State Court its petition and bond for removal of the cause to the United States Circuit Court, Northern District of Texas, the sole ground of the petition for removal being *diversity of citizenship*, and no other ground existing therefor. (Record pp. 4, 5, 6). No Federal question of law was presented by the petition.

The transcript of the record from the State Court was duly filed in the Circuit Court, and plaintiff in error filed its original answer in that Court, presenting no question that would give this Court jurisdiction, pleading: (1) general demurrer; (2) general denial; (3) specially, that the proofs of death did not show that the insured was dead; (4) breach of warranty, in that the insured stated in his application for insurance, that his occupation was "real estate and farming, prior was bookkeeping." That he was not and had not been for a long time prior thereto, if he ever was, engaged in farming, and that his occupation at the time and just preceding the making of said application was that of an assistant in a photograph gallery. (Record p. p.).

On November 11, 1899, the defendant in error filed her first amended original petition, pleading ~~said~~ Art. 3071, of the Rev. Stats. of Texas, 1895, providing for ~~said~~ 12 per cent. damages and reasonable attorney's fees in such cases as this, and suing therefor in addition to the principal and interest originally sued for. In this petition defendant in error also pleaded in waiver of the insufficiency of her proofs of death, if same were insufficient, as follows:

"5. That upon receiving from plaintiff, as afore-

said, notice of the death of the said William A. Hunter, it was the duty of the defendant, according to the terms of its policies, to furnish plaintiff blank forms for proof of death and claim, it being usual for life insurance companies to furnish same, and it being provided by said policies that plaintiff should make said proof of death and claim upon such blank forms, proper blank forms to be furnished by the said defendant, as aforesaid.

"Plaintiff shows that the defendant, upon receiving said notice of the death of her brother, sent its 'general, agent,' representative and adjuster, R. C. Milliken, to Pecos, Texas, with printed blank forms, for proof, to furnish plaintiff said forms and to receive the proof when executed; that the said R. C. Milliken, for the defendant, came to Pecos in response to said notice, saw plaintiff, who was a widow, without a male relative in Texas, and wholly ignorant as to how to make out said proof of death and claim, and represented to her that he would advise her of the necessary requirements of and information to be embraced in her said proof of death and claim, and aid her in making out the same. Plaintiff avers that, knowing her own ignorance in reference thereto, and having been induced to believe by the said R. C. Milliken that he would act in the best of good faith in the matter, plaintiff, at his re-

quest, gave him full information in reference to said William A. Hunter leaving Pecos and being drowned in Pecos River, and of where he had spent his life, and in what business he had engaged, and information where he could obtain his latest photograph, and gave him full data in reference to the names and address of his father, brothers, sisters, that is full information of the family, and where and in what business they had spent their lives, all of which said R. C. Milliken stated was necessary because the body of William A. Hunter was not found. That said R. C. Milliken, having been advised as aforesaid, himself wrote out the answers to the questions in said blank proofs of death and filled out all blanks therein, representing to the plaintiff that he had written all necessary matters therein, and plaintiff believing the same to be true and relying upon the said representations, signed and made oath to same before J. B. Gibson, of Pecos, District Clerk in and for Reeves County, said Milliken having selected said officer to administer said oath, and on the same day delivered same to him the said R. C. Milliken, he being duly authorized by the defendant to receive the same, and the same he promptly furnished the defendant at its Home Office; and the same is now in the possession of the defendant, and it is given notice to produce the same

upon the trial of this cause, or secondary evidence thereof will be introduced by the plaintiff.

"Plaintiff shows that about the day after and the second and third days after receiving said 'proofs of death,' said R. C. Milliken called to see plaintiff with typewritten questions, also in reference to the death of William A. Hunter, and then and there prepared and wrote her answers thereto, and had her sign and make oath thereto before said officer, J. B. Gibson, and received the same, stating to the plaintiff that the printed form was not sufficient, and that said affidavits were necessary in the making of the proofs of death of William A. Hunter, of which affidavits and the contents thereof the said Milliken promptly advised defendant, and furnished the same to the Home Office of the defendant.

"Plaintiff avers that after the proofs of death and accompanying affidavits were prepared and executed, as aforesaid, the said R. C. Milliken then and there received and accepted same, at Pecos, Texas, for the defendant, as he was sent to Pecos with authority to do, without an intimation that they were not satisfactory, but to the contrary, he led plaintiff to believe that the same were satisfactory and that the said policies would be paid; all of which was done with the full knowledge, consent and ap-

proval of the defendant company.

"Plaintiff avers that in addition to her proof of death and claim made and delivered to R. C. Milliken, as aforesaid, and as a part thereof, at the special instance and request of the defendant made by and through its agent and representative, Abb Landis, defendant was furnished on or about the 25th day of January, 1897, a letter containing a full written statement in reference to the death of her brother, written by plaintiff to her father, W. A. Hunter, of Homer, Ohio, on December 30th, 1896, and obtained by the defendant on the day and year aforesaid, at its Home Office in Philadelphia.

"Plaintiff says that if her said proof of death and claim are not satisfactory, as pleaded in defendant's answer herein, which she denies, it is because of the fraud and deceit aforesaid of the said R. C. Milliken in the preparation of the same.

"Plaintiff avers that the defendant adopted and ratified the acts, representations, statements, promises and conduct of said Milliken, and is bound thereby.

"Plaintiff shows that on account of the fact that no one saw said deceased, William A. Hunter, when he was drowned, or his body thereafter, his body never being recovered, it was impossible for plaintiff to furnish to the defendant other facts for

proof of death than she did, which plaintiff avers, were reasonably sufficient and should be satisfactory to the defendant. That the defendant refused to pay said policies, denied liability, and asserted that said William A. Hunter was not drowned, thereby relieving plaintiff from the duty of making any other or further proof than that which was submitted to the defendant by plaintiff; that the defendant still insists that the said Hunter is alive and sets up the same as one of the defenses in its answer filed herein; that defendant's said agent, and through him, the defendant was fully advised of all the facts and evidence upon which plaintiff relied to establish the death of her said brother; that said Milliken obtained affidavits from her witnesses, as well as from herself; that all of the proofs of death, affidavits, etc., were, as aforesaid, gotten up and prepared by said agent; that if they are not sufficiently full or omitted anything necessary, it was on account of the failure and fraud of said agent; that defendant refused to pay said policies without direct evidence of the death of the said William A. Hunter, and the manner of his death made it impossible to produce that character of proof, it became impossible for her to furnish proof satisfactory to defendant, though as aforesaid, the proof so made was, and should be held, under the

circumstances of this case, sufficient to meet the terms of said policies requiring plaintiff to furnish reasonable proof of the death of her said brother; and in justice and right, defendant should now be estopped from attacking the sufficiency of said proof of death, and should not now be permitted to interpose the same as a defense herein.

"6. Plaintiff avers that the defendant is estopped from asserting that her proof of death and claim is not satisfactory, for the reason that after it was furnished to the defendant, as aforesaid, and the surrender of the policies properly receipted offered by plaintiff upon the payment thereof, defendant in nowise notified plaintiff that the same was not sufficient within ninety days thereafter, nor within any reasonable time, but ignored the proofs of death and declared her brother alive regardless thereof, and the policies became then and there, to-wit, ninety days after said proof was furnished to defendant, due and payable, and defendant is now estopped from denying the sufficiency of said proof, having received and accepted the same without notifying the plaintiff within the time required by said policies that the same were not satisfactory.

"7. Plaintiff further says that the defendant has waived proof of death and claim of any char-

acter whatsoever, by denying any liability on said policies; for that, on or about the day after receiving said proofs of death and affidavits, as aforesaid, the defendant did, by and through its said representative, R. C. Milliken, acting for the defendant in the usual scope of his duties and with authority, did state to the plaintiff, at Pecos, Texas, in substance that he had only been pretending to believe that William A. Hunter was dead; that he was not dead; that defendant would find him in a few days; and plaintiff states that while this conversation was going on the telegraph messenger called at her house and asked if said Milliken was there, and gave him a telegram, which, after reading, said Milliken handed to plaintiff, requesting her to read the same. The telegram was sent from defendant's state agency or office at Dallas, Texas, and was signed by one of defendant's representatives, whose name plaintiff cannot recall, and the substance of the telegram was that William A. Hunter had been found and arrested and would be brought at once to Pecos; that said R. C. Milliken urged that if plaintiff would cancel and surrender said policies before her brother was turned over to the sheriff at Pecos, that he, the said Milliken, would protect him and her from criminal prosecution.

"Plaintiff shows that said telegram was false

and fraudulent, and, together with the language of defendant's representative, Milliken, constituted not only a denial of any liability whatever, but an attempt on defendant's part to coerce, scare and frighten plaintiff into admitting defendant was not liable and relieving it from liability by cancelling and surrendering said policies;—all of which facts plaintiff is ready to verify, and pleads the same as a complete waiver of any proof of death and claim whatsoever; and plaintiff gives the defendant notice, as it has heretofore done, to produce said telegram upon the trial of this cause, or secondary evidence thereof will be made.

"8. Plaintiff shows that upon receipt of said notice of the death of William A. Hunter, defendant's said general agent and adjuster, R. C. Milliken, came to Texas and made a personal examination of and into all the facts and circumstances in reference to the death of said William A. Hunter, and though the same were amply sufficient to satisfy any reasonable person that William A. Hunter was, as plaintiff had notified defendant, dead, he had said telegram sent to himself, and showed the same to plaintiff, and by the false and deceitful means aforesaid, endeavored to frighten plaintiff into cancelling and surrendering to him said policies and releasing his company from its liability; and denied any lia-

bility whatever on the part of defendant, of which conduct the defendant was promptly advised by their said representative, and instead of repudiating the same, defendant has acted upon the same and ratified the same; whereby defendant waived said preliminary proofs of death, and should not now be heard to say that it is not liable upon its said policies because said proofs of death furnished by plaintiff, as aforesaid, are not satisfactory to it."

The plaintiff in error on the second day of February, 1900, filed its first amended original answer, in which it pleaded, in addition to the matters plead in its original answer, by special exception, that the 12 per cent. damages and reasonable attorney's fees sued for were in contravention of Sec. 1, Art. XIV of the Federal Constitution; and by special answer, that if Hunter was drowned, it was premeditated and suicidal; that William A. Hunter failed to pay the semi-annual premium due April 28th, 1897, vitiating the policies according to their terms; and plead by special answer, what it had already plead by exception, that the 12 per cent. damages and reasonable attorney's fees were unconstitutional. (Record pp. 14, 15, 16).

On the 28th day of May, 1900, the plaintiff in error amended its answer so as to render irrelevant its conduct pleaded in estopped and waiver of the

proofs of death being insufficient, if same were not sufficient, filing its second amended original answer, and plead by exception, in addition to the exceptions theretofore pleaded, as follows:

"(c.) Defendant specially excepts to all of paragraph No. 5 in said petition, because the same presents no issuable fact, because the averments therein are immaterial and irrelevant to any issue, and because they are calculated to prejudice the defendant on the trial of the case, and because there is no issue in the case, as to the sufficiency of the preliminary proofs or of any preliminary proofs.

"(d.) Defendant also specially excepts to paragraph No. 6, because there is no issue in the case involving the question of estoppel.

"(e.) Defendant also excepts to paragraph No. 7, because the allegations therein are immaterial and irrelevant to the issue, because same is calculated to prejudice the defendant on the trial hereof.

"(f.) The defendant also specially excepts to paragraph No. 8 of said petition, for the reason above indicated, and prays that each one of these special demurrers be sustained by the Court, and the said immaterial, irrelevant and prejudicial matter be stricken from the files and for naught held."

In this answer plaintiff in error repeated its general denial and special pleas or answers in refer-

ence to the alleged misstatement of Hunter as to his occupation; his alleged failure to pay the semi-annual premiums due April 28th, 1897; and that the 12 per cent. damages and reasonable attorney's fees were in violation of the Federal Constitution; but omitted the plea that the proofs of death did not show that William A. Hunter was dead, thereby eliminating and rendering the allegations above quoted from the petition setting forth the conduct of the insurance company's representative, Milliken, immaterial and irrelevant.

When the case came on for trial the plaintiff in error, before the Court and jury, waived the other special defenses pleaded in its answer, its waiver being embodied and made of record in the bill of exceptions, being as follows:

"Defendant admitted that all matters of proof re-
"lating to the death of the insured—all formal proofs—
"are sufficient, and that the only question to be tried
"and involved, is the question of whether or not Wil-
"liam A. Hunter is dead as claimed in plaintiff's peti-
"tion, and whether he died in the manner and form as
"alleged therein. Thereupon the Court sustained spe-
"cial exceptions, C, D, E and F of defendant to plain-
"tiff's amended petition." (Record pg. 36).

The trial resulted in a judgment in favor of defendant in error on July 4th, 1900, for

$21550.00; including 6 per cent interest, the statutory damages of 12 per cent. and reasonable attorney's fees.

The jurisdiction of the United States Circuit Court having been acquired solely on the ground of diversity of citizenship, the United States Circuit Court of Appeals, Fifth Circuit, had final jurisdiction of the cause, and this Honorable Court is without jurisdiction thereof.

In Wanton vs. DeWolf, 142 U. S. 138, a suit removed from the State Court to the Circuit Court of the United States on the ground of diversity of citizenship, the Court held: "It appears from the record that the suit involves land situated in California, and was commenced in the State Court against the defendants who were citizens of Rhode Island and New York, and after summons by publication, was removed on their application to the Circuit Court. The ground of Federal jurisdiction was diverse citizenship.

"By the act of March 3rd, 1891, (26 Stat. 826, c. 517,) establishing the Circuit Court of Appeals, the jurisdiction of this Court, in cases dependent upon diverse citizenship, was taken away; but by the joint resolution of March 3rd, 1891, (26 Stat. 1115,) the jurisdiction was preserved as to pending cases and cases wherein the writ of error or appeal

should be sued out or taken before July 1st, 1891."

In C. S. & L. Co., vs. G. R. S. D. Co., 146 U. S., 54, a motion was presented to dismiss for want of the jurisdiction of *the Court below* depending solely upon the diverse citizenship of the parties. The Court held, Chief Justice Fuller rendering the opinion: "Judgment was rendered in this case by the Circuit Court of the United States for the Southern District of Ohio on April 25th, 1891. An entry was made of record, June 19th, 1891, that the Court 'allow a writ of error to the Supreme Court of the United States, with stay of execution, upon the filing of a supersedeas bond,' as described, and such a bond was filed and approved June 20th, 1891. A petition for the allowance of the writ of error and an assignment of errors were filed in the Clerk's office of the Circuit Court, July 3rd, 1891, and the writ of error bears test and was filed in that office on that day, and a citation to the adverse party signed and served."

"The motion to dismiss must be sustained upon the authority of Wauton vs. DeWolf, 142 U. S."

That is to say, the Supreme Court held, that diversity of citizenship being the ground upon which the Circuit Court's jurisdiction was acquired and depended, by the Act of March 3rd, 1891, (26

Stat. 826, c. 517,) establishing the Circuit Courts of Appeals, its jurisdiction was taken away, and said Circuit Court of Appeals were given final jurisdiction of such cases.

In Borgmeyer Adm'r vs. Idler, 159 U. S., 408, Chief Justice Fuller rendering the opinion, the Court held: "When the original jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case."

In Colorado Central Consolidated Mining Co., vs. Turck, 150 U. S., 138, Chief Justice Fuller rendering the opinion, the Court held that the Supreme Court exercises appellate jurisdiction only in accordance with the Acts of Congress on that subject. That when the original jurisdiction of a Circuit Court of the United States is invoked upon the sole

ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked.

When the jurisdiction of a Circut Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. This was an action in ejectment in the Circuit Court of the United States for the District of Colorado. At the outset the Circuit Court was given jurisdiction on the ground of diversity of citizenship. In the Circuit Court the question was raised as to whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of section 2322 of the U. S. Revised Statutes, concerning the dip and apex of lodes, and that the suit really and substantially involved a controversy only to be determined by reference to the Federal

statute, and that jurisdiction existed on that ground and did not depend entirely upon diversity of citizenship.

The Court say: "To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence or the rulings of the Courts below."

"This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the Circuit Court, is limited to the facts appearing on the record in the first instance." (p. 142.)

In Ex-parte Jones, 164 U. S. 691, the Court held, Mr. Justice Brown rendering the opinion: "In this case the original bill averred the complaintant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the Act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship. Colorado Central Mining Co.. vs. Turck, 150 U. S., 138; Borgmeyer vs. Idler,

159 U. S., 408."

II.

The jurisdictional quéstion presented by plaintiff in error, namely, that said Art. 3071, Rev. Stats. of Texas, 1895, providing for 12 per cent. damages and reasonable attorney's fees in such cases as this, is in contravention of Sec. 1, Art. XIV, Constitution of the United States, is not an open, but settled question by the decisions of this Court, and plaintiff in error is attempting to perpetrate a fraud upon the jurisdiction of this Court, and the writ of error should be dismissed for want of jurisdiction.

The statute complained of, said Art. 3071, as originally passed on May 2, 1874, is the ninth section of an Act entitled, as follows:

"An Act to Regulate Life and Health Insurance Companies, and all Associations, Partnerships or individuals doing Life and Health Insurance business incorporated within or without the State of Texas." 2 Pasch. Dig. Art. 7116.

The said section nine, was carried forward into the Revised Statutes of Texas of 1879, where it appears in Articles 2953 and 2954, c. 3, of Title 53, relating to the general subject of insurance, in the precise language in which it now appears in the Revised Statutes of Texas of 1895, in Articles 3071 and 3072, c. 3, of Title 58, on the subject of insur-

ance, as follows:

"Art. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

"Art. 3072. Should any life or health insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after the officer holding such execution has demanded payment therefor from any officer, agent or attorney of such company in this State or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this State until said execution be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company."

The Revised Statutes of Texas, 1895, Art.

3096a, provides:

"A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy holders, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities.

Article 3071 is not in contravention of the XIV Amendment of the Federal Constitution, and, in the light of the decisions, it is a fraud upon the jurisdiction of this Court to so contend. To give this Court jurisdiction the Federal question should be made in good faith and not frivolously and fraudulently. The plaintiff in error is a mere creation of local law, and can have no legal existence beyond the limits of Pennsylvania, the sovereignty which created it, and the recognition of it in other States and the enforcement of its contracts made therein depend purely upon the comity of those States.

In Paul vs. Virginia, 8 Wall, 168, the case of Bank of Augusta vs. Earle, 13 Peters, 519, was quoted with approval: "As said by this Court in Bank of Augusta vs. Earle, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even

by other States, and the enforcement of its contracts made therein, depend purely upon the comity of these States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with the citizens as in their judgment will best promote their public interest. The whole matter rests in their discretion."

We submit that a corporation cannot invoke that provision of Sec. 2, Art. IV, of the Constitution of the United States, which gives to the citizens of each State the privileges and immunities of the citizens of the several States. Pembina Mining Co., vs. Penn, 125 U. S. 181: Ducot vs. Chicago, 10 Wall, 410.

It has since been held in Blake vs. McClung, 172 U. S. 239; and in Orient Ins. Co., vs. Daggs, 172 U. S. 557; and in Waters Pierce Oil Co., vs. Texas,

177 U. S. 28—see p. 45, that the prohibitive words of the XIV Amendment of the Federal Constitution have no broader application in that respect.

In Hooper vs. California, 155 U. S. 648, conditions upon a foreign corporation were considered, and a statute of California sustained, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws, and which had not filed a bond required by the law of the State. All preceding cases were cited, and it was assumed and settled, "that the right of a foreign corporation to engage in business within a State other than that of its creation depends solely upon the will of such other State." And the exception to the rule was stated to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

In Waters Pierce Oil Co. vs. Texas, *supra*, the Court held: "The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has

often been declared by this Court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating Act has made them, and can only be exerted in the manner which that Act authorizes. In other words, the State prescribes the the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations." This case cites with approval, Paul vs. Virginia, and Hooper vs. California, *supra*.

In Railway Co., vs. Matthews, 174 U. S. 96, the Court passed upon the constitutionality of the provisions of Sec. 2, Chapter 155 of the Acts of Kansas of 1885, entitled "An Act relating the liability of Railroads for Damages by Fire," providing that "in all actions commenced under this Act, if the plaintiff shall recover, there shall be allowed him by the Court a reasonable attorney's fee, which shall become a part of the judgment."

Matthews brought his suit in the State Court for the loss of property by fire, recovered judgment, including attorney's fees, and the judgment being affirmed by the Supreme Court of Kansas, the Railway Company brought the case to this Court

on error. This Court held:

"It is contended that it is in conflict with the Fourteenth Amendment to the Federal Constitution, and this contention was distinctly ruled upon by the Supreme Court of the State adversely to the Railroad Company. In support of this contention great reliance is placed upon Gulf, Colorado & Santa Fe Ry. Co., vs. Ellis, 165 U. S. 150. In that case a statute of Texas allowing an attorney's fee to the plaintiffs in actions against railroad corporations on claims, not exceeding in amount $50, for personal services rendered or labor done, or for damages, or for overcharges on freight, or for stock killed or injured, was adjudged unconstitutional. It was held to be simply a statute imposing a penalty on railroad corporations for failing to pay certain debts, and not one to enforce compliance with any police regulations . . . . . While there is a similarity, yet there are important differences, and differences which in our judgment compel an opposite conclusion. The limit in amount, ($50), found in that statute, made it clear that no police regulation was intended, for if it were, the more stock found on the track the greater would be the danger and the more imperative the need of regulations and penalty."

"We have referred to the interpretation placed

upon the respective statutes of Texas and Kansas by their highest Courts, not as conclusive, but as an interpretation toward which we ought to lean, and which, in fact, commends itself to our judgment."

"It is also clear that the legislature, (which has power in advance to determine what rights, privileges and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. St. Louis, &c., Railway Company vs. Paul, 173 U. S. 404. It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not likely hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

In the Court below plaintiff in error relied upon the Ellis case, which, as held in the Matthews case, is not applicable to statutes like the Kansas law; and certainly not to the Texas statute under consideration, which is the exercise of the right to enact and to enforce regulations and conditions on

which foreign insurance companies are permitted to do business in the State.

In Insurance Company vs. Herriott, Treasurer State of Iowa, et al., 91 Federal Reporter, 711 it was contended that the insurance laws of Iowa (Code, Sec. 1333), requiring foreign insurance companies doing business therein to pay to the State each year a percentage of the gross premiums received from such business during the previous year was in contravention of the Fourteenth Amendment of the Federal Constitution.

The Court held, Judge Shiras rendering the opinion: "In the bill filed it is averred that the complainant companies, more than 15 years ago, were admitted into the State of Iowa for the purpose of transacting the business of insurance, and that they then fully complied with all the provisions and requirements of the laws of Iowa necessary to secure their lawful admission into and recognition by the State, and that they have since complied each year with the requirements of the State laws and have each year had issued to them the certificate showing their authorization to continue in business in Iowa. It is further averred that in reliance upon this action on part of the State the complainants have expended large sums of money in establishing agencies, in securing offices,

in advertising, and in providing the materials necessary to conduct their business in Iowa, and that they have entered into many contracts of insurance with the citizens of Iowa, which are now in force, and have expended large amounts in meeting the obligations arising in Iowa in connection with the business which they were authorized by the State to undertake in Iowa."

"It cannot be denied that the State has the right to prescribe the terms, conditions and burdens subject to which a foreign corporation can obtain the right of admission into the State, and it is beyond question that, so long as the provisions of Section 1333 remain in force, no foreign corporation can secure the privilege of admission into the State, except upon a compliance with its requirements. But it is said that, after a foreign corporation has once rightfully entered the State, and engaged in business therein, no additional burden or restrictions can be imposed as a condition to the exercise of the right to continue in business. The power and right of the State to exclude foreign corporations, not engaged in interstate commerce, or in the furtherance of the business of the United States, from entering the State, includes the right to preclude such foreign corporations from continuing in business, and also includes the right to impose conditions upon such

continuances. When a foreign corporation has been admitted into a State, and has, in connection with the business it was authorized to carry on, accumulated property, or entered into contracts, such property and contract rights are under the protection of the law, but the right to invoke protection for such acquired property does not confer upon the corporation the right to insist that it shall be permitted to enter into further contracts, or acquire other property, contrary to the expressed will of the State embodied in an Act of the Legislature."

"The privilege of continuing in the business of insurance within the State, in the case of the complainant companies, is derived from the legislation of the State, and it is for the Legislature to determine, from time to time, upon what terms, and subject to what conditions, such privilege will be continued to the companies. The general subject of the power of the State to wholly exclude foreign corporations from carrying on business therein, or to impose terms, conditions, and restrictions upon the privilege was fully considered by the Supreme Court in Paul vs. Virginia, 8 Wall., 168; and in Ducot vs. Chicago, 10 Wall., 410."

In Merchants Life Association of the United States vs. Yoakum, 98 Fed. Reporter, 251, the Court of Appeals, Fifth Circuit, in error to the Circuit

Court of the United States for this, the Northern District of Texas, the same attack was made upon this very law,—Rev. Stats. of Texas, 1895, Art. 3071, quoted above, as is now being made upon it. That is to say, the same old contention which has been exploded by this Court, time and time again, since the decision of Paul vs. Virginia, *supra*.

The opinion of this Court, rendered by Judge McCormick, is an exhaustive, able and philosophical discussion of the question in the light of the numerous decisions upon the question, and should satisfy any one open to conviction that the law is valid, and is a lawful condition imposed by Texas upon foreign insurance companies doing business in Texas.

In the above case the Court say: "The fourth assignment is that 'the Court erred in rendering judgment for 12 per cent. damages upon $5,000.00, and also for $750 for attorney's fees, for the reason that such charges constitute a penalty upon the defendant for defending this litigation, and discriminate against it, and are consequently contrary to law and unconstitutional.' . . . . . It must be manifest to the most casual observation that the parties to these insurance contracts and to such a controversy are unequally matched. It is human nature and human experience that the stronger will

use his strength. He may piously declare his benevolent intentions, and disclaim any purpose to profit by his power, but he will use it none the less. Without the aid of a legal fiction, we cannot say or think that the minds of these contracting parties do or can ever meet. One is a mere legislative thought, a legal, artificial, imaginary entity, invisible, endowed with immortality, and almost superhuman powers of organization and delegated activities, and infinite capacity for expansion and the receiving of tribute. It can act only through agents. For the exercise of its controlling powers, it is able to secure, and constantly retain, the highest order of talent in every department of its organization. In a world-wide field of minute operations these governing agents, wherever located, must, of necessity, be practically unapproachable by the vast concourse of parties with whom the invisible principal deals. A hierarchy results. Of this hierarchy the lowest rank, in prodigious swarm, fill the land. The scope of their agency is limited with marvelous skill. Armed with longer and shorter catechisms, and a form of covenant devised with consumate ingenuity. . . . . The subject is a large one. It is one peculiarly vital to public interest. It challenges legislative attention. The foregoing examples, which we have

taken from the record in this case and from the Texas Reports, are by no means exceptional in that State, but are representative. It seems to us that the State legislation drawn in question by this assignment is not in conflict with the Fourteenth Amendment to, or any other provisisn of, the Constitution. It is not simply a statute imposing a penalty on life or health insurance companies for failing to pay certain debts, but is one to enforce reasonable regulations and conditions on which such companies are permitted to do business in Texas. The purpose of this statute is not to compel the payment of debts. Life and health insurance companies do not usually neglect or defer the payment of their admitted debts. They generally advertise themselves as having a large accumulation of surplus revenue, and as being ready to pay, as soon as it matures, whatever debt they owe. The obvious purpose of the act is to secure a righteous degree of care in writing policies of insurance, so that the immortal insurer will not receive premiums from an honest recipient of one of its policies which does not bind it to meet the loss that he bargains it shall meet, and in consideration for which he parts with his money while he is alive and able to make earnings, that he may, to the extent stipulated, protect his family or his creditors

against the contingency of his death, which must occur. To enforce the exercise of this righteous care on the part of the very strong in contracting with the weaker and less learned, and in conducting humanely this particular business that reaches so often across the graves of the insured to the homes of the afflicted dependents, so that the insurers will not receive premiums from honest parties whom the contracts as written do not insure, would seem to be within the legislative power. The classification here involved is, therefore, not arbitrary, but has reasonable relation to the peculiar features of the business to which it applies. It does not discriminate against some and favor others, but, though limited in its application, does, within the sphere of its operation, affect alike all persons similarly situated. It seeks to observe the general interest of the public. . . . . As Articles 3071 and 3072, c. 3, Tit. 58, Rev. Stat. Texas, were in force at the time the Yoacum policy was written, those provisions were assented to by the contracting parties, and were written into the contract."

The Supreme Court of Texas also holds that Article 3071 is not violative of the Constitution of Texas nor of the Constitution of the United States. Insurance Company vs. Chowning, 86 Texas, 654;

Causalty Company vs. Allibone, 90 Texas, 660.

In the light of these decisions, we submit that the right of the State of Texas to enact the law complained of by plaintiff in error, and to enforce the condition embraced therein upon all life and health insurance companies doing business in Texas, as they are defined in said Article 3096a, including plaintiff in error, cannot be seriously questioned. When the insurance company obtained and accepted the application of William A. Hunter for the insurance, and when it executed and delivered the policies and received from him the premiums, it knew that the provision of the law became a part of the contract of insurance, imposed by the State as a condition upon its being allowed to do business in Texas, and its contention that the law is inhibited by the Federal Constitution is not made in good faith and is a fraud upon the jurisdiction of this Court, which should require a dismissal of the writ of error.

III.

Premises considered, defendant in error prays that the writ of error herein be dismissed for want of the jurisdiction of the Court and for such other

and further relief as to the Court may seem fit and proper.

Wm H. Clark,
C. A. Culbertson

Counsel for the Defendant in Error, Jennie M. Mettler.

Motion to dismiss or affirm.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 2, 1901.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS, AT DALLAS.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM THE JUDGMENT.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-2-'01

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS, AT DALLAS.

Motion to Dismiss Writ of Error or Affirm the Judgment.

Now comes Jennie M. Mettler, defendant in error in the above-entitled cause, a *feme sole*, and moves the court to dismiss the writ of error herein, because this court is without jurisdiction of the cause, and in the event said motion is denied that the judgment be affirmed.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 165.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

v.

JENNIE M. METTLER, DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

This cause is presented in two phases: (1) Motion to dismiss the writ of error for want of jurisdiction, and (2) the questions on the merits, and they will be considered in this order.

First.

On March 30, 1901, defendant in error submitted a motion to dismiss the writ of error for want of jurisdiction in this court, but it was passed for consideration when the case should be submitted on its merits. On December 2, 1897, defendant in error, a *feme sole*, filed suit against the plaintiff in error in the district court of Dallas county, Texas, on three policies of life insurance, each for the sum of five thousand dollars, on the life of her brother, William A. Hunter. The action, begun by petition under the rules of

pleading in Texas, was in the ordinary form of life-insurance policies, and concluded with a prayer—

"That upon a hearing hereof plaintiff have judgment against the defendant for said principal sum of fifteen thousand dollars, together with interest and damages provided by law, for costs of suit, and for such other and further relief, general and special, as to the court may seem fit and proper."

On January 4, 1898, plaintiff in error filed petition for the removal of the cause to the circuit court of the United States for the northern district of Texas, the petition being as follows, to wit:

"Your petitioner, The Fidelity Mutual Life Association, respectfully shows to this honorable court that it is the defendant in this suit, which was filed herein December 2nd, 1897, and which is of a civil nature, and that the matter and amount in dispute in this cause exceeds, exclusive of interests and costs, the sum or value of $2,000.00.

"That the controversy herein is wholly between citizens of different States, and which can be fully determined as between them; that the plaintiff, Jennie M. Mettler, was at the time of the commencement of this suit, and still is, a resident and citizen of the State of Texas and of Reeves county, in said State, and that your petitioner, The Fidelity Mutual Life Association, was at the time of the commencement of this suit, and still is, a resident of and citizen of Pennsylvania, and of no other State, and a non-resident of the State of Texas, and that it is a corporation created and incorporated under and by virtue of the laws of the State of Pennsylvania, and has its domicile, place of business, home office, and citizenship and residence in the city of Philadelphia, in said State of Pennsylvania, and that your petitioner desires here now, before it is required by the laws of this State or rules of this court to plead or answer in this suit in this court and before the trial thereof, to remove this suit into the next circuit court of the United States to be held in the northern district of Texas; that it is not so required to appear or answer before January 4th, 1898.

"And your petitioner offers herewith good and sufficient

sureties for its entering into the circuit court of the United States for the northern district of Texas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if it shall hold that this suit was wrongfully or improperly removed thereto, and for entering special bail in said suit if special bail was originally requisite therein.

"And your petitioner therefore prays that the said sureties and bond may be accepted; that this said suit may be removed into the next circuit court of the United States to be held in the northern district of Texas, pursuant to the statutes of the United States made and provided, and that no further proceedings may be had herein in this court; and it will ever pray."

Acting upon this petition, the cause was removed by order of the district judge January 4, 1898, and it will be observed from the foregoing petition that the removal was sought and had solely on the ground of diversity of citizenship.

After removal of the cause to the circuit court of the United States, to wit, on November 11, 1899, defendant in error filed her first amended original petition, in which, among other things, it was for the first time expressly alleged:

"Plaintiff shows that the defendant is, by virtue of the statute of Texas of 1895, in reference to providing against life and health insurance companies and associations refusing and failing to pay their losses within the time provided for in their policies, liable to plaintiff herein, and promised to pay her, in addition to the amount called for by said policies, twelve per cent. damages on the amount of said claim, together with all reasonable attorneys' fees for the prosecution and collection of such loss, which attorneys' fees plaintiff alleges to be fifteen per cent. of the principal, interest, and damages due plaintiff by defendant on account of plaintiff having to prosecute this suit. Plaintiff shows that the statute imposing damages and attorneys' fees upon defendant for failing to pay the loss within the times specified in the policies was first enacted by the legislature of Texas

on May 3rd, 1874; it was carried into the Revised Statutes of 1879, and again into the Revised Statutes of 1895, substantially in the same form, which statute the supreme court of Texas has often and uniformly held to be void. Plaintiff shows that the policies sued on were issued October 31st, 1896, after said statute of 1895 went into effect; that the defendant, as a foreign corporation, was allowed by the State of Texas to issue policies upon the life of William A. Hunter, a Texas citizen, by comity, and had the right, as it did, to prescribe said terms as a condition precedent to defendant's issuing said policies. Plaintiff shows that the defendant agreed and was when it issued said policies obligated to comply with the law of the State of Texas to procure its permit to transact and engage in business in Texas, whereby it became bound and is liable to plaintiff for said twelve per cent. damages and reasonable attorneys' fees."

The prayer in this pleading of defendant in error, her first amended original petition, is:

"Wherefore plaintiff prays that on a hearing hereof, the defendant having already been cited, that she have judgment for $15,000, the face of said policies, with legal interest thereon, together with twelve per cent. damages thereon, and reasonable attorneys' fees, namely, ten per cent. of the amount recovered, for all costs of suit and such other and further relief as to the court may seem fit and proper."

It will be noted that in the original petition, prior to removal, the prayer is for the "principal sum of fifteen thousand dollars, together with interest and damages provided by law, for costs of suit," while after removal, in the first amended original petition, it is for "fifteen thousand dollars, the face of said policies, with legal interest thereon, together with 12 per cent. damages thereon, and reasonable attorneys' fees, namely, ten per cent. of the amount recovered, for all costs of suit."

The statute of the State of Texas under which damages and attorneys' fees are claimed, and which plaintiff in error

insists is in conflict with the Constitution of the United States, is article 3071 of the Revised Statutes, as follows:

"In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss."

The plaintiff in error after removal specially excepted to that part of the first amended original petition of defendant in error heretofore set out which claims attorneys' fees and statutory damages, upon the ground that the same are asserted and claimed under a statute of the State of Texas which is in violation of section 1, article 14, of the Constitution of the United States, and on the trial said exceptions were overruled by the circuit court.

Upon this record it is submitted that this court is without jurisdiction. By the fifth section of the act of 1891 creating the circuit courts of appeals, writs of error may be prosecuted to this court from the circuit courts "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States," and by the sixth section of that act it is provided that "the judgments or decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." Undoubtedly in this case jurisdiction of the circuit court depended entirely upon the opposite parties being citizens of different States, for that was the only ground of removal, and by all the authorities nothing subsequent to removal can add to or take from the jurisdictional facts. As to jurisdiction, neither the original petition nor the petition for

removal, by which alone the question is to be tested, contain any averments except as to diversity of citizenship. The jurisdiction of the United States circuit court having therefore been acquired solely on the ground of diversity of citizenship, the circuit court of appeals for the fifth circuit had final jurisdiction of the cause. It is true that subsequent to removal it was claimed by plaintiff in error that the statute of Texas was in conflict with the Constitution, but this should not be held to add to the jurisdictional facts, for by no other construction can the fifth and sixth sections of the act of 1891 be fairly and justly harmonized. In analogous cases it has been held that when the Federal question arose after the filing of the petition this court was without jurisdiction.

Company *v.* Turck, 150 U. S., 138.
Borgmeyer *v.* Idler, 159 U. S., 408.
Ex parte Jones, 164 U. S., 691.

In removal cases especially this rule should prevail, because, as we have already said, jurisdiction cannot be made to appear or be destroyed after removal proceedings are filed. The plaintiff in error deliberately elected to stand on diversity of citizenship as to jurisdiction and did not claim in its petition for removal that the statute of Texas was in conflict with the Constitution of the United States. This is particularly significant when the original petition claimed the statutory damages under the terms "damages provided by law," in the prayer and thus, at the outset, presented the question. Applying the principles announced by this court in the most recent case, when the jurisdictional facts should have been presented the pleadings stated "no other ground of Federal jurisdiction" except diversity of citizenship, and as "nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court."

Loeb *v.* Township Trustees, 179 U. S., 472, 477.

It ought not to be held that under the fifth section of the act of 1891 this court has jurisdiction if it is "claimed" *at any time* that a State law is repugnant to the Federal Constitution. In the case at bar the claim should have been made in the petition for removal. Such construction, just and fair in itself, will harmonize sections 5 and 6 of the act of 1891 and effectuate their policy.

Second.

The only other question so far presented (January 27, 1902) in any brief of the plaintiff in error is that article 3071 of the Revised Statutes of Texas is repugnant to the Constitution of the United States because it denies to plaintiff in error the equal protection of the laws.

The statute of Texas which is attacked provides in effect that where a loss occurs and the life or health insurance company liable fails to pay the same within the time specified by the policy after demand made, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the collection thereof. As we gather it, the argument seems to be that the legislature of Texas is without authority to impose payment of damages and attorneys' fees upon life and health insurance companies on losses when payment of like damages and fees is not imposed upon persons and corporations generally on their debts or upon mutual benefit and mutual relief associations and accident insurance companies for their losses.

The precise question thus raised has been settled against the contention of plaintiff in error quite recently in this court, in the case of *United States Life Insurance Company v. J. E. Ross*, administrator. This action was originally instituted in the district court of Limestone county, Texas, was removed to the United States circuit court for the

northern district of Texas, at Waco, where final judgment was entered at the November term, 1899, and this judgment was affirmed by the circuit court of appeals at New Orleans, June 1, 1900. On July 14, 1900, a petition for a writ of certiorari was filed in this court, in which, among other things, the following is set forth:

"6. Upon conclusion of the testimony the judge presiding gave a peremptory instruction to the jury to return a verdict for the respondent for the full sum of the policy, to wit: $10,000, together with legal interest thereon from the first of March, 1895, as well as twelve per cent. statutory damages under the statutes of Texas and reasonable attorneys' fees, which were conceded to be ten per cent. upon the amount of recovery. Petitioner presented counter-instructions submitting various issues arising upon the testimony, all of which counter-instructions were refused, and thereupon petitioner excepted to the charge of the court and to the refusal of instructions requested, and duly saved the same by bill. The jury found in accordance with the instructions of the court for respondent for the full amount of the policy as well as interest, statutory penalty and reasonable attorneys' fees, their finding being in the aggregate the sum of fifteen thousand five hundred and twenty-five $\frac{79}{100}$ dollars. Respondent moved for a new trial upon the grounds that it was error in the court to overrule the motion to suppress the deposition of Harris as well as error in the court in awarding to respondent a peremptory instruction in view of the conflicting evidence in the case, the whole case resting substantially upon the testimony of J. W. Harris, especially that feature relating to delivery of the policy *vel non*, in which testimony Harris had plainly contradicted himself. Defendant also based its motion for a new trial upon the further ground that by reason of said peremptory instructions and the conflict of the evidence it had been deprived of a constitutional right of trial by jury, and further because the statutes of the State of Texas authorizing the imposition of a statutory penalty of twelve per cent. upon a life insurance company, as well as reasonable attorneys' fees, was an embargo upon justice, discriminatory, denied to life insurance companies the equal protection of the laws, and de-

prived such companies of their property without due process of law, was arbitrary and unreasonable, in that no other person or corporation was subject under the laws of Texas to such pains and penalties for the failure to pay a debt, and was therefore violative of the Constitution of the United States. The court overruled the motion for new trial, and thereupon petitioner prosecuted error in the United States circuit court of appeals for the fifth circuit, and which court on, to wit: the 4th day of June, 1900, did affirm the judgment of the court below, and almost immediately thereafter did adjourn for the term. Petitioner has attempted to file in said circuit court of appeals its motion for rehearing, but under the rules of said court it is necessary after the final adjournment for the term and before filing a motion for rehearing to obtain the consent and order of some judge before the said motion could be filed. Petitioner has applied to the Honorable A. P. McCormick, one of the judges of the circuit court of appeals, for permission to file its motion for rehearing within twenty days as prescribed by the rules of said court, but such permission has been refused; wherefore petitioner says it is wholly remediless except by the interposition of this honorable court."

* * * * * * *

"*Fourth.* The validity of the Texas statute imposing a penalty upon life insurance companies alone of twelve per cent. damages and reasonable attorneys' fees besides interest, no such imposition being placed by the laws of said State upon any other person or corporation, has never been adjudicated by this court and presents a question entitled to the consideration of the court. This statute has been sustained by the highest court in the State of Texas and it has also been sustained by the United States circuit court of appeals for the fifth circuit, in the case of The Merchants' Life Association of America *v.* Yoakum, decided by said last-named court in May, 1899. No case has been found, however, where this question has been ruled upon by this honorable court."

The question was discussed in briefs by counsel for both parties, and on October 15, 1900, the petition was denied. Undoubtedly while a writ of error will not lie to both the

circuit court of appeals and the Supreme Court in the same case (Loeb *v.* Township Trustees, 179 U. S., 472), yet it was competent for this court to grant the petition for *certiorari* and take cognizance of the case (Robinson *v.* Caldwell, 165 U. S., 359, 362; Clews *v.* Jamieson, 182 U. S., 461), and its refusal was tantamount to a rejection of the contention.

So, too, the question is settled against plaintiff in error by the decisions of the circuit court of appeals for the fifth circuit, by those of the court of civil appeals of Texas and by those of the supreme court of Texas.

Ins. Ass'n *v.* Yoakum, 98 Fed. Rep., 251.
Ins. Co. *v.* Ross, 102 Fed. Rep., 722.
Casualty Co. *v.* Dorough, 107 Fed. Rep., 389.
Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Chowning, 86 Texas, 654.
Casualty Co. *v.* Allibone, 90 Texas, 660.

In view of the decision in the *Ross* case, where the identical question was squarely presented and necessarily determined, it seems useless to enter upon an extended presentation of it here. It appears sufficient, even in abundant caution, to state briefly the two general grounds upon which this and kindred statutes have been upheld, leaving to oral argument a more comprehensive statement if such should be desired:

1. The statute is a condition upon which plaintiff in error is authorized to do business in Texas, and the fact of its engaging in business constituted an acceptance of the condition.

The first general insurance statute of Texas was passed May 2, 1874. It contained in one section a provision for the payment of 12 per cent. damages and reasonable attorneys' fees, and a provision to the effect that if an insurance com-

pany so liable should fail to pay off and satisfy any execution that might lawfully issue on a final judgment within thirty days after information thereof, the certificate issued to such company should immediately become null and void. This latter clearly shows that the provision as to damages was a condition to the permit to do business in the State and is as follows:

"ART. 7116*o*. The several foreign life insurance companies, and those incorporated out of this State, in all cases where a loss occurs, and where they refuse to pay the same within the time specified in the policy, shall be liable to pay the holder of said policy, in addition to said loss, not more than twelve per cent. on the liability of said company for said loss; also all reasonable attorneys' fees for the prosecution of the case against said company; and should any such company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty days after notification of the issuance thereof, then and at that event, the certificate issued to said company shall immediately become null and void, and said insurance company shall be prohibited from transacting any business in this State until said execution shall have been fully satisfied and discharged" (2 vol. Paschal's Digest Laws, p. 1457*d*).

In the revision of the laws of Texas, without changing their meaning and effect, these provisions were embodied in two articles, and now appear in the Revised Statutes as follows:

"ART. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of such loss.

"ART. 3072. Should any life or health insurance company fail to pay off and satisfy any execution that may lawfully issue on any final judgment against said company within thirty

days after the officer holding such execution has demanded payment thereof from any officer, agent or attorney of such company in this State or out of it, such officer shall immediately certify such demand and failure to the commissioner of insurance, and thereupon the commissioner shall forthwith declare null and void the certificate of authority issued by him to such company, and such company shall be prohibited from transacting any business in this State until said execution shall be fully satisfied and discharged, and until such commissioner shall renew his certificate of authority to such company."

In addition to these articles, the purpose to make the liability for damages and attorneys' fees a condition upon the right to do business in Texas is emphasized by subdivision 15, article 3050, of the Revised Statutes of Texas, defining the duties of the commissioner of insurance, as follows:

"He shall suspend the entire business of any company of this State, and the business within this State of any other company, during its non-compliance with *any* provision of the law relative to insurance, or whenever its assets appear to him insufficient to justify its continuance in business, by suspending or revoking the certificate granted by him, and he shall give notice thereof to the insurance commissioner or other similar officer of every State, and shall also publish notice thereof."

Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Allibone, 15 (Texas) Ct. Civ. App., 178.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Allibone, 90 Texas, 660.
Ins. Co. *v.* Herriott, 91 Fed. Rep., 711.
Ins. Co. *v.* Yoakum, 98 Fed. Rep., 251.
Fire Ass'n. *v.* New York, 119 U. S., 110.
Ins. Co. *v.* New York, 134 U. S., 594, 601, 602.
Ins. Co. *v.* Daggs, 172 U. S., 557, 566, 567.
Tullis *v.* R. R. Co., 175 U. S., 348, 352.
Oil Co. *v.* Texas, 177 U. S., 28.
Petit *v.* Minnesota, 177 U. S., 164, 168.
Ins. Co. *v.* Cravens, 178 U. S., 389.
Ins. Co. *v.* Warren, 181 U. S., 73, 76.

An analysis of the Texas cases above cited will show that it is held by the courts of that State that the statute giving damages and attorneys' fees is a condition upon which the insurance companies may do business in Texas, and this interpretation, it has been held, will be followed by this court. On this point the case of Ins. Co. *v.* Daggs, *supra*, is pertinent. In this case it was held by the supreme court of Missouri (136 Mo., 282) that the valued policy law of that State, to the effect that in all suits on policies of insurance against loss or damage by fire the defendant should not be permitted to deny that the property insured thereby was worth the full amount issued thereon, was constitutional, and in affirming the judgment this court said (172 U. S., 566, 567):

"The statute is not subject to the condemnation that it regulates contracts made or rights acquired prior to its enactment; and we may repeat the language of Mr. Justice Field, in Missouri Railway Co. *v.* Mackey, *supra*, that 'it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State.'

"That which a State may do with the corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in Hooper *v.* California, 155 U. S. 648, and need not be repeated.

"It is urged that the statute is not made a condition upon foreign corporations, but this view is not open to our acceptance. The supreme court of Missouri, exercising its function of interpretation, decides that it is. But we do not care to enter fully into the subject of conditions on corporations, foreign or domestic. The statute is sustained on the grounds that we have given."

2. The classification of life and health insurance companies made by the statute is a valid exercise of legislative power.

Ins. Co. *v.* Walden, 26 S. W. Rep., 1012.
Ins. Co. *v.* Orloff, 61 S. W. Rep., 336.
Ins. Co. *v.* Yoakum, 98 Fed. Rep., 251.
Ins. Co. *v.* Ross, 104 Fed. Rep., 722.
Casualty Co. *v.* Dorough, 107 Fed. Rep., 389.
Ins. Co. *v.* Chowning, 86 Texas, 654.
Casualty Co. *v.* Allibone, 90 Texas, 660.
R. R. Co. *v.* Mackey, 127 U. S., 205.
Ins. Co. *v.* New York, 134 U. S., 594.
Giozza *v.* Tiernan, 148 U. S., 657, 662.
Magoun *v.* Savings Bank, 170 U. S., 283.
Ins. Co. *v.* Daggs, 172 U. S., 557.
R. R. Co. *v.* Paul, 173 U. S., 404.
R. R. Co. *v.* Matthews, 174 U. S., 96.
Sugar Co. *v.* Louisiana, 179 U. S., 89.
Williams *v.* Fears, 179 U. S., 270, 275, 276.
Ins. Co. *v.* Warren, 181 U. S., 73, 76, 77.

So far as we are advised, the case of Insurance Co. *v.* Warren, *supra*, is the latest one in which these questions are discussed by this court, and it is there held not only that a kindred statute to the one under consideration was a condition upon the right to do business in the State, "the same as if the law was copied into and made a part of the policy" (p. 75), but that the classification of life insurance companies by the legislature was not a violation of the Federal Constitution by the State in its power over corporations. In this case the supreme court of Ohio (59 O. State, 45) had affirmed the constitutionality of a section of the Revised Statutes of Ohio which provided, in effect, that no answer to any interrogatory made by the applicant for a policy shall bar the right to recover or be used in evidence on a trial unless it

be clearly proved that such answer is wilfully false and was fraudulently made; that it is material and induced the company to issue the policy, and that but for such fraud the policy would not have been issued, and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer. This, as will be seen, is a statute only applicable to life insurance companies, thereby putting them in a separate and distinct class; and this court, in affirming the judgment of the supreme court of Ohio, said pp. 75, 76, 77):

"In the present case the supreme court of Ohio sustained the constitutionality of section 3625 of the Revised Statutes, which was in force at the time this policy was issued, upon the ground that the State had a right 'to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby and must accept the burdens with the benefits.' The legal effect was held to be the same 'as if the section was copied into and made a part of the policy.' And it was said that the statute had also been held constitutional in National Life Insurance Co. *v.* Brobst, 56 Ohio St., 728, where no opinion seems to have been delivered.

"The section in question applies to all life insurance companies doing business in the State of Ohio, and the State can certainly do with foreign corporations what it may do with corporations of its own creation.

"In Orient Insurance Co. *v.* Daggs, 172 U. S., 557, we held that provisions in the Revised Statutes of Missouri, that 'in all suits upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount inserted therein on said property,' etc., and 'that no condition of any policy of insurance contrary to the provisions of this article shall be legal or valid' were not in conflict with the Constitution of the United States. And this was affirmed in New York Life Insurance Co. *v.* Cravens, 178 U. S., 389.

"In Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, where a

statute of Texas was assailed on the ground that it took away the liberty of contract, Mr. Justice McKenna, delivering the opinion of the court, said: 'The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is, has often been declared by this court. A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations.' And as the State court had held that the statute was a condition imposed on the oil company on doing business within the State, it was said of it that 'whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it.' And see Tullis *v.* Railroad Company, 175 U. S. 348; Equitable &c. Assurance Society *v.* Clements, 140 U. S. 226.

"It was for the legislature of Ohio to define the public policy of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as were deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

W. H. Clark,

C. A. Culberson,

Counsel for Defendant in Error.

No. 165

Add'l Br. of Clark & Culberson

for D. C.

FILED
JAN 30 1902
JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 30, 1902.

No. 165.

THE FIDELITY MUTUAL LIFE ASSURANCE COMPANY OF PHILADELPHIA, PLAINTIFF IN ERROR,

v.

JENNIE M. METTLER, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1958

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 165.

THE FIDELITY MUTUAL LIFE ASSURANCE COMPANY OF PHILADELPHIA, PLAINTIFF IN ERROR,

v.

JENNIE M. METTLER, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Up to January 27, 1902, when we were compelled to send the manuscript of our brief to the printer, no question had been discussed in this cause by any counsel for plaintiff in error except that of the jurisdiction and the constitutionality of the Texas statute, and consequently our brief is also confined to those two questions. On January 28th, however, counsel for plaintiff in error filed a brief in which three other questions are presented, and this additional brief, necessarily prepared in haste, is filed in answer, being confined to the three propositions referred to, and which will be considered here in the order presented in the brief for plaintiff in error.

Before proceeding with these matters the attention of the

court is called to the admission made in open court by plaintiff in error (Rec., p. 36), as follows:

"Defendant admitted that all matters of proof relating to the death of the insured—all formal proofs—are sufficient and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition and whether he died in the manner and form as alleged therein."

First.

Under the circumstances, the court did not err in admitting the testimony of a repute in the family of Hunter concerning his death. The only testimony on this subject is that of the defendant in error (Rec., pp. 48, 49) and the other surviving members of her family (Rec., pp. 56, 57), to the effect that the general repute in the family was that Hunter was dead, having been drowned in the Pecos river, in Texas.

It will be observed by the court that inasmuch as each and every member of the family testified to the same thing on this subject—the defendant in error in open court and the other members of the family by deposition—there is, strictly speaking, no question of hearsay involved, because the jury was not called upon finally to make up their verdict upon what one member of the family testified as to the other. Whatever objection might have been urged to the testimony of either of the witnesses singly, the fact that what such witness might have said with reference to other members of the family may have been hearsay was obviated and removed by introducing the testimony of them all as was done.

The trial court (Rec., p. 48) in admitting this testimony limited and controlled it as follows:

"I think the question is one of weight to be given the evidence. It is a question for the jury to say whether family belief tends to prove his death."

Taking all the circumstances into consideration in connection with this instruction of the court to the jury, the testimony was not objectionable.

1 Taylor, Ev., sec. 572.
2 Rice, Ev., pp. 1223, 1224.
1 Greenleaf, Ev. (12 ed.), secs. 103, 104.
Jackson *v.* Bonham, 15 Johnson, 226.
Doe *v.* Griffin, 15 East., 293.
Webb *v.* Richardson, 42 Vt., 465.
Cochrane *v.* Libbey, 18 Me., 39.
Clark *v.* Owens, 18 N. Y., 434.
Jackson *v.* Etz, 5 Cow., 314.
Morris *v.* Edwards, 90 N. C., 382.
Ewing's Heirs *v.* Savory, 3 Bibb, 235.
Mason *v.* Fuller, 45 Ver., 29.
Ringhouse *v.* Keener, 49 Ill., 470.

Second.

For three reasons the contention of plaintiff in error, beginning at page 13 of the brief, on the subject of warranty as to the business or calling of Hunter at the time of the issuance of the policy, is not well founded.

1. The entire charge of the court is not in the record, nor is there anything in the record to show that the subject of warranty was not covered by the general charge. In the absence of such showing this court will presume, if the evidence demanded a charge on this question, it was given in the general charge.

Reagan *v.* Aiken, 138 U. S., 109, 113, 114.

2. There was not sufficient evidence to support a charge to the jury on the subject of warranty as to Hunter's business or calling. In his application for insurance, dated October 28, 1896, Hunter stated (Rec., p. 42) that "my present

occupation is real estate and farming—prior to that book-keeping." This answer is abundantly supported by the testimony, for it is shown that he was in the real-estate and farming business; that he occupied a section of land in Loving county, Texas, for three years (Rec., p. 46); that he was in the real-estate and farming business (Rec., p. 49); that he was engaged in farming, "planted everything he could think of to see if it would grow, planted corn, grain, potatoes, beans, lettuce, radishes, watermelons" (Rec., p. 51). It was also shown by the testimony (Rec., p. 50) that Hunter resided at Mentone, Loving county, Texas, "where he engaged in the real-estate and farming business and looked after their irrigation business in Loving county."

As justifying a charge on this subject, plaintiff in error points to the forfeiture of claims of Hunter as to public domain in Texas (Rec., pp. 68, 69, 70), and to the testimony of a photographer (Rec., p. 82). As to the forfeiture, it is sufficient, it seems to us, to say that it is not shown that he did not occupy the land notwithstanding such forfeiture, and especially (Rec., p. 70) the so-called forfeitures were not entered until February 8, 1897, after the death of Hunter.

The testimony of the photographer referred to is as follows:

"Jno. Schwarts, being duly sworn in behalf of defendant, testified:

"I reside at Fort Worth, Texas, and have about six or seven years; am acquainted with Mrs. Mettler, the plaintiff; have known her about 15 years. I know W. A. Hunter; have known him about the same length of time; I knew him at Fort Worth, Texas; was once in my employment; assisted in waiting on customers; I think it was in the year 1896; he came to Fort Worth the first part of the summer and stayed there during the summer; do not know what month he left; think he was there about three months; I was well acquainted with Hunter; he boarded at three or four different places; roomed at the gallery, my place of business; I last saw him late in the fall, either November

or December; he was there in Fort Worth; came to Dallas after he left Fort Worth and was there a few days.

"Witness was asked whether Hunter had a valise of any character; if so, describe it: He had a small hand grip about like that, as well as I remember (pointing to a small hand grip on the table); it was a dark tan color. Think he left my employ in July or August; he came to Dallas after he left Fort Worth; he was here several months before he went West, I suppose.

"On cross-examination witness testified:

"I slept at the gallery part of the time; have known Hunter about fifteen years; first met him at Fort Worth; *was in my employ part of the time, two or three months in the summer;* he was not getting much salary; he was unemployed and making his expenses; I think, as well as I remember, he had a grip something like that pointed out. I don't remember his having a large grip; one of those cloth grips that slip up and down--telescope. I do not undertake to say he did not have one; I don't remember whether he had one or not."

Rec., p. 82.

With reference to this testimony it seems enough for us to point out that it is not only too vague and indefinite as to the time when Hunter was at the photograph gallery in Fort Worth, the witness not being able even to fix the year positively to support a charge as to breach of warranty, but that admitting that the time covered by it was that covering also the date of the application for insurance, the temporary work he did in the photograph gallery would not justify the submission to the jury of the question of breach of warranty.

In this connection we call the attention of the court to the fact (Rec., pp. 106, 107) that the application for insurance was made to the State agent, who had known Hunter since 1888, and esteemed him "a man of good character." In the conversation between Hunter and the State agent, leading up to the formal application for insurance, Hunter stated with considerable detail his connection with farming, real estate,

and irrigation matters in western Texas, which, as we have before pointed out, is abundantly supported by the testimony.

3. Taken altogether, the policy and the answers in the application did not constitute a warranty as to the business or calling of Hunter.

Ins. Co. *v.* Munger, 92 Tex., 297, 304.
Moulor *v.* Ins. Co., 111 U. S., 335.

Third.

The contention with reference to charges given and refused, beginning at page 18 of the brief of plaintiff in error, is not, in our judgment, well founded.

The substance of the charge refused, as shown at page 20 of the brief of plaintiff in error, was given in the general charge, as shown at the same page, in a manner much more pertinent to the testimony.

The entire charge of the court not being in the record, the court will assume, if they be applicable, that the charges asked, as shown at pages 21 and 22 of the brief of plaintiff in error, were given in the general charge.

In the charges given as well as those refused the trial court was governed and controlled by the principles announced in the well-considered cases cited below.

Davie *v.* Briggs, 97 U. S., 628.
Insurance Co. *v.* Stevens, 71 Fed. Rep., 258.
Sensendeifer *v.* Ins. Co., 19 Fed. Rep., 68.

W. H. CLARK,
C. A. CULBERSON,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 428.

THE FIDELITY MUTUAL LIFE ASSOCIATION OF PHILADELPHIA, PLAINTIFF IN ERROR,

vs.

JENNIE M. METTLER, DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS, AT DALLAS.

ADDITIONAL ARGUMENT FOR DEFENDANT IN ERROR.

The brief for plaintiff in error in opposition to the motion of defendant in error to dismiss the writ of error or affirm the judgment incorrectly states, on page 6 of its brief, the 12 per centum damages allowed by the statute as being $5,175. The correct amount is $1,800 (Trans., p. 19).

The brief also ignores the fact that when the circuit court acquired jurisdiction, the statute allowing the 12 per centum

damages and reasonable attorneys' fees not only did not appear, but was not involved in the case. The petition of plaintiff in the State court and the defendant's petition for removal show that the alleged Federal question was not involved, and therefore it could not be raised by the defendant when the jurisdiction of the circuit court was acquired.

As said in Loeb *vs.* Columbia Township Trustees, 179 U. S., 477:

"The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court."

Such is the case at bar.

If there was any doubt upon this question the Loeb case would settle it.

In the Loeb case the act of Ohio was pleaded to show the authority for the issuance of the bonds sued on, and the validity of the act was involved, as appeared from the petition. The decision does not overrule or modify the cases cited in the brief of defendant in error, but, as shown by the above-quoted language, approves their well-settled rule. Plaintiff in error misunderstands the Loeb case, notwithstanding its language is very plain.

Respectfully submitted.

C. A. Culberson,
Wm. H. Clark,
For Defendant in Error.

Supreme Court of the United States.

No. 165.—October Term, 1901.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error, vs. Jennie M. Mettler. } In error to the Circuit Court of the United States for the Northern District of Texas.

[May 5, 1902.]

This was an action brought by Jennie M. Mettler in the District Court of Dallas County, Texas, December 2, 1897, and removed to the Circuit Court of the United States for the Northern District of Texas, against the Fidelity Mutual Life Insurance Association of Philadelphia, to recover on three policies of insurance upon the life of one William A. Hunter, payable to his widowed sister, Jennie M. Mettler, each stipulating for the payment of $5,000 in case of Hunter's death. The policies were dated in October, 1896, and Hunter paid at the time of their delivery the sum of $32.55 on each policy, and agreed to pay on each a like sum semi-annually thereafter, on the 28th day of the months of April and October, for the period of ten years from October 28, 1896.

At the commencement of the trial "defendant admitted that all matters of proof relating to the death of the insured, all formal proofs, are sufficient, and that the only question to be tried and involved is the question of whether or not W. A. Hunter is dead as claimed in plaintiff's petition, and whether he died in the manner and form as alleged therein."

The evidence tended to show that Hunter left Mrs. Mettler's house on the third of December, 1896, announcing his intention to go to Mentone, in Loving County, for the purpose of making proof of a section of land in that county belonging to him, and which he had occupied for three years; that he left with a team consisting of a wagon and two horses, with hay, provisions, camping outfit, cooking utensils, and a gun; and that he expected to be absent a week or ten days, intending, at a later period, after having returned from Mentone, to go back to that place; that shortly before leaving he handed to a lawyer a package of papers sealed in a large envelope, which he asked should be kept in a vault, and which packages contained the policies of insurance; and that Mrs. Mettler did not know that the policies had been taken out in her name.

The evidence further tended to show that Mrs. Mettler, not hearing anything of her brother for fifteen days after his departure, sent twice to ascertain whether he had arrived, but found that he had not; a searching party

then went out; this party followed the trail of the wagon, and found it and hay, provisions, harnesses, &c., abandoned where Hunter had camped near the banks of the Pecos River, some miles distant from Pecos; a bed on the ground, which some one had slept in, cooking utensils, remains of a fire, a skillet in which meat had been fried, some bread, some tomatoes were there; and a gun was leaning against the wagon wheel. One of the horses was lying dead; it had been tied to a mesquite bush with an inch rope, and had struggled to get to the hay, but could not reach it; there were signs of the other horse, which was elsewhere seen wandering about with a rope on its neck. Footprints, identified by Mrs. Mettler as those of her brother, were found leading to the river, but not returning; two water buckets were near; some of the foot tracks were at the edge of the river; and there were marks of the slipping of one of the feet, and a broken mesquite root in the bank.*

There was conflicting evidence as to quicksands in the river; its depth; rapidity; and dangerous character. Two of defendant's witnesses gave

---

*The county clerk of Reeves County, who headed the searching party which left Pecos on the morning of December 27, testified in respect of the abandoned camp thus: "The wagon was standing with the tongue pointing to the southwest and a little down the river. The harness for two horses was found; two wooden water buckets, with a piece of rope tied in the bail; off to the right of the wagon, about twelve feet from the wagon, was a dead horse, tied to a mesquite bush with a rope about twelve feet long. On the right side of the wagon was a pallet made down. The spring seat had been taken off the wagon and turned upside down, and the wagon sheet laid lengthwise. The sheet was a tarpaulin; this was laid on the ground and spread out full length, with one end resting on the wagon seat. One or two heavy cotton comforts were doubled lengthwise and lay with the end on the wagon seat. Lengthwise of the wagon sheet and on top were two comforts spread out full size, and the wagon sheet had been drawn up over the entire bed. To the left of that, about four feet south and away from the edge, was where there had been a little fire, and there was a skillet and lid. The skillet was setting right where the fire had been built, as if in the middle of the fire and the lid laying against it. The skillet looked like it had been cooked in. Just behind the front wheel of the wagon, leaning against the axle, was a Winchester rifle. In the wagon were two bales of alfalfa hay and some flour, some canned goods, some light bread, and several joints of stove pipe, and I think, may be, a stove in the wagon and a few other such things. The bread had been untied, and there was still some of it in the paper. When I first saw the bed the center of the bed had the shape of a man in it; looked so much like it we thought there was a man in it until we got right up, and when George Mansfield started to raise the cover up he dropped it, and turned and looked at me, his face as white as anything could be, and I told him to raise it up; that if there was a man in it, it would not hurt him, and he raised the cover up. The appearance of the bed was as I have described it; there was just the shape of a man there, as if a man had lay in bed; the print of him was in bed. I think both

testimony tending to show that some time after the alleged death they had seen a person whom they identified as Hunter by photographs.

In the course of the examination of plaintiff the following occurred:

"'Q. State what is the general reputation in the family—your father, brothers, and sisters—as to the death of your brother, W. A. Hunter.' To which defendant objected because it is incompetent and hearsay; (2) family reputation cannot establish or prove death, especially where it is 1,500 miles away; (3) it is competent for no purpose, especially when that reputation has been established since the institution of this cause of action, which objection the court overruled and said: 'I think the question is one of weight to be given the evidence. It is a question for the jury to say whether or not family belief tends to prove his death.' To which ruling defendant then and there excepted for the reasons stated in the objection, and the witness thereupon testified: 'My father, brothers, and sisters all believe my brother to be dead.' Witness further testified, over the same objections made by defendant, which objections were overruled by the court, and then and there excepted to by defendant, 'that the family believed he was drowned in the Pecos River, out in the West, and that this family belief has existed ever since I wrote them about it.' The witness was here handed a letter, which she recognized as written by herself and

---

buckets had a piece of rope tied in the bail ten or twelve feet long, and on the bottom two or three inches around; the buckets had the prints of water having been in there and dried up, and a little red sand; they were both dry. The dead horse could not reach the wagon; it had been tied to a mesquite bush with an inch rope, and it appeared that the horse had been struggling to get to the hay in the wagon; he had gone out as far as he could with the rope; there was considerable trail beat around where he was trying to get to the wagon where the hay was. The trail was two or three inches deep. There had been other stock about the wagon and camp; there was the sign of another horse there, and we trailed that horse away from the wagon and back to the wagon at about a half a dozen places. I think one bale of hay had been eaten and tramped down; there was a great deal of trash on the back end of the wagon and laying on the ground."

The witness then described the tracing of the tracks of a man "to the edge of the river and back to the wagon;" then later other footprints "going toward the bank of the river at a point higher up." "We followed right up to the edge of the bank and followed that until they went over a little slant; the top of the river bank was a little sloping; these two footprints, last two, were standing right on that slant, left foot a little behind the right. The footprints had been about half facing the river. The left foot seemed to have turned a little and slipped; the print of it was there, and showed that it had slipped; and just in front and just below where this bank dropped off perpendicular there was a mesquite root that had been broken off and a part of it was sticking out of the ground. We could see none of these tracks were going back and away from the river; we looked to determine whether they did go away from it and we could not see any going away from there."

Mrs. Mettler, being informed of the discovery, went to the camp with this witness, December 29, and she identified the footprints and testified to the same effect.

addressed to her father, dated December 30, 1896. 'I think I wrote it the day I came back from the camp, from where we found my brother's camping outfit.' 'I reported that my brother was dead. I know he wrote to and received some letters from the family. The very best relations existed between my father and brother. Never was any disagreement between them. The very closest of friendship existed between my brother and me; brotherly and sisterly love.'"

Plaintiff introduced the depositions of W. A. Hunter, Sr., the father of the insured; Charles E. Hunter, his brother; and five sisters, all residing in Homer, Ohio. The father testified that plaintiff and W. A. Hunter, Jr., lived at Homer until they went to Texas in 1885; that a family correspondence had been kept up with both of them regularly until the fall of 1896, when he disappeared, and was still kept up with her; that the family relationship was happy and affectionate; that his son's habits were good, and that he possessed the confidence of his family and of his friends; that he "seemed thoroughly contented with life, and I know of no reason to cause any change in his disposition. I could not tell exactly when any member of the family at Homer last received a letter from said William A. Hunter, Jr., but a short time before his disappearance. I last heard of him through Jennie M. Mettler, about the time he disappeared, and he was living at Mentone, Texas, I believe."

The following question was propounded to the witness, W. A. Hunter, Sr., and to the other members of the family:

"Q. If you know, state what is the general reputation and repute in the family as to whether said William A. Hunter is dead or alive? How do you know the general repute in the family as to whether he is dead or alive? If you know, what is the general repute in the family as to what has become of said William A. Hunter? As to the 'family,' who do you mean?"

To this question and the answer thereto of each witness, defendant then and there objected which was overruled, and defendant excepted. The answer was.

"A. That the general repute in the family is that William A. Hunter, Jr., is dead. He is supposed by the family to have drowned in the Pecos River; that is the general belief. By the 'family' is meant the father and the brothers and sisters of William A. Hunter, Jr."

Each of the other witnesses testified in substance as their father, and the same objection was made to their testimony, and the same ruling had and exception preserved. The father testified "in answer to cross interrogatories propounded by defendant, that he never offered any reward or took any steps to find W. A. Hunter, Jr., either dead or alive, after he heard of his disappearance; that he made no inquiry concerning the said W. A. Hunter, Jr., save through his daughter, Mrs. Mettler; that he did not have the Pecos River seined, and made no search either of the river or

elsewhere, or any effort to find him or his body. Newark, Licking County, Ohio, is sixteen miles from witness' home. When witness saw the articles published in the Newark Advocate about the disappearance of W. A. Hunter, Jr., he did not go there to see the editor of said paper. The town is not connected by rail with witness' residence. The same facts as to failure to offer reward or to make any search or inquiry for W. A. Hunter, Jr., were elicited by cross interrogatories from Charles E. Hunter, brother of the plaintiff and W. A. Hunter, Jr."

The jury was charged, among other things: "Reputation in his (insured's) family on the part of his father, sisters and brothers of his death is proper evidence for your consideration, but not the opinion of any one."

The policies were stated to be made in consideration of written application of Hunter therefor, and a copy of the application was attached. Hunter therein agreed "that the truthfulness of the statements above made or contained, by whomsoever written, is material to the risk, and is the sole basis of the contract with the said association;" "that I will not without the written consent of the president engage in any occupation or employment more hazardous than that above mentioned; and that if any concealment, or untrue statement, or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be *ipso facto* null and void, and all moneys paid hereon shall be forfeited to said association." And the applications showed, among other things, that Hunter in answering questions as to his occupation said: "That my present occupation is real estate and farming, prior was bookeeping."

There was evidence that Hunter had occupied a section of land in Loving County for three years; that he was in the real estate and farming business; that he planted corn, grain, potatoes, and so on; that the farming was experimental, the land requiring irrigation; that he and Mr. Mettler, then deceased, had been connected with an irrigation company and the construction of a ditch; and that he resided at Mentone, Loving County, "where he engaged in the real estate and farming business, and looked after their irrigation business in Loving County." That he was bookkeeping in 1888 and 1889, and two years, deputy clerk, &c. Defendant introduced evidence in reference to forfeitures of Hunter's claims to public lands entered in February, 1897; and the testimony of a photographer that Hunter was in his employ two or three months one summer at Fort Worth, which he thought was in 1896. Defendant's agent who took the application testified that he had known Hunter since 1888, at which time he was keeping books; that Hunter stated when he applied that he was in the real estate business and farming, and that witness had a talk with him about irrigation matters in connection with his farming.

This witness testified for defendant that when Hunter made the application he said: "That he and his brother-in-law had gotten into an irrigation

scheme and had bought a good deal of Pecos Valley land and owed a good deal of money on the land, and his brother-in-law had afterwards died, and he thought, if he should happen to die, his sister would lose what they had paid. For this reason he thought of taking some insurance, so that she could pay the land out in the event of his death."

The constitutionality of the statute of Texas allowing twelve per cent damages and reasonable attorneys' fees was denied and duly put in issue by defendant.

The verdict was for plaintiff for "$15,000 as principal; $2,250 as interest at rate six per cent from December 2nd, 1897, to June 2nd, 1900; $5,175, the same being twelve per cent damages on the amount of $15,000 and interest thereon at six per cent; $2,500 as reasonable attorneys' fees." Plaintiff remitted the sum of $3,375 of said $5,175, "leaving $1,800 on the item of twelve per cent damages, on the amount of the loss," and judgment was thereupon entered.

The writ of error was allowed directly from this court, and a motion to dismiss for want of jurisdiction was made, the consideration of which was postponed to the merits.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Inasmuch as the validity of the statute of Texas authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses was seasonably drawn in question by defendant below as being in contravention of the Constitution of the United States, we think the case comes within *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472; *American Sugar Refining Company* v. *New Orleans*, 181 U. S. 277, and that the writ of error may be maintained. The motion to dismiss is therefore overruled.

Four propositions are relied on as grounds of reversal, which we will consider in the reverse order in which they are stated in the brief for plaintiff in error.

I. "The court erred in not charging the jury to find a verdict in favor of the defendant because of the failure to offer sufficient evidence from which an inference of Hunter's death could be drawn."

In our opinion the evidence was sufficient to justify the inference that Hunter was drowned in the Pecos River, on December 4, 1896, and the court below properly refused to peremptorily instruct the jury to find for defendant.

The question of Hunter's death was a question of fact to be determined on all relevant facts and circumstances disclosed by the evidence. The evidence tended to show that he was last seen alive on December third, when he parted from his sister and started for Mentone, with the intention of returning in a few days. He did not arrive, nor return, but disappeared.

He camped on the banks of the Pecos River; and the abandoned wagon, harnesses and gun, the starved horse, the ashes of the fire, the used cooking utensils, the fragments of food, the bed with its imprint of the sleeper, bore testimony that he cooked, ate, and slept there, and that he went no farther. The footsteps to the river's brink, going but not returning, the water buckets, the mark of slipping, the fractured root, the flowing stream, indicated what might have happened, and the fact that he was not seen nor heard from thereafter, although his relations with his family were intimate and cordial, and he had always kept up a correspondence with them, so that one or more of them would have been likely to hear from him unless his life had abruptly terminated or its habitual course been suddenly changed, rendered the inference of fatal accident reasonable.

The record does not set forth the general charge of the court in full, but, among others, this instruction was given: "While death may be presumed from the absence, for seven years, of one not heard from, where news from him, if living, would probably have been had, yet this period of seven years during which the presumption of continued life runs, and at the end of which it is presumed that life ceases, may be shortened by proof of such facts and circumstances connected with the disappearance of the person whose life is the subject of inquiry, and circumstances connected with his habits and customs of life, as, submitted to the test of reason and experience, would show to your satisfaction by a preponderance of the evidence that the person was dead."

Defendant excepted to the giving of this instruction, and requested the court to instruct that "the circumstances proven must exclude, to a reasonable and moral certainty, the fact that such person is still living, and each fact in the chain of facts from which the death of the party is to be inferred must be proved by competent evidence and by the same weight and force of evidence as if each one were the main fact in issue, and all the facts proven must be consistent with each other and consistent with the main facts in issue, that is, the death of the party."

The court did not err in giving the one and refusing the other instruction. This was not a criminal case, and it was not necessary that the death should be proven beyond a reasonable doubt. The party on whose side the weight of evidence preponderated was entitled to the verdict. Proof to a "moral certainty" is an equivalent phrase with "beyond a reasonable doubt." Gray, C. J., *Commonwealth* v. *Costley*, 118 Mass. 1. In civil cases it is sufficient if the evidence on the whole agrees with and supports the hypothesis that it is adduced to prove, but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. It has been held in some cases that when a criminal act is alleged the rule of reasonable doubt is applicable in establishing that act, but this is not such a case. 1 Greenleaf Ev. (15th ed.) § 13*a*, note.

The court also instructed the jury as follows: "If from the evidence in this case you should come to the conclusion that Hunter has been continuously absent since December 3rd, 1896, without being heard from by his relatives and friends, it should have due weight with you in arriving at your verdict." "Absence alone cannot establish the death of Hunter, for the law presumes an individual shown to be alive and in health at the time of his disappearance continues to live. While the death of Hunter is not to be presumed from absence alone, yet it is a circumstance which should be taken into consideration with all the other evidence in the case, and the conclusion of life or death arrived at from all the facts and circumstances, including his continued absence."

To this defendant excepted, and it is now argued that there was error because the court did not call the attention of the jury to defendant's contention that Hunter's continued absence might be attributed to the desire to obtain the insurance money. But it nowhere appears that defendant requested the court to modify the instruction in that particular, and as given it was correct.

The jury were not left to infer death from the mere fact of disappearance, but were specifically told that that was not in itself sufficient, and that all the facts and circumstances must be considered.

Defendant asked the court to give this instruction: "If you believe from the evidence that William A. Hunter, Jr., has been seen or heard from by any one at any time since his disappearance, you will find for the defendant." This the court refused, and gave the following instruction: "The evidence of witnesses is also before you tending to show that William A. Hunter has been seen on two occasions and at two places since the date of his alleged disappearance on December 4, 1896. You should carefully consider this evidence in relation to his having been seen since the date of his alleged disappearance, and if you believe from the evidence that he was seen by the witnesses who have testified to this, then, of course, it would be your duty to find for the defendant."

There was some evidence that Hunter had been seen, but none that he had been otherwise heard from. The request of defendant was rightly rejected, and the instruction given was sufficient. The criticism that the jury may have supposed that they were instructed that they must be satisfied that he had been seen by both witnesses, or on two occasions, is without merit. It was impossible to have misunderstood what the learned judge of the Circuit Court intended. If, as matter of fact, Hunter was seen alive, whether once or twice, then, of course, he did not die as contended by plaintiff.

It is further argued that the court erred in not instructing the jury as requested by defendant, that "unless the jury believe from the evidence that William A. Hunter, Jr., when last seen was in a position of peril, such as that it is more probable that he then and there lost his life than that he

extricated himself from such perilous position alive, you must find for the defendant." Such an instruction was uncalled for and calculated to mislead. There was no evidence that Hunter was in a position of peril when last seen. The evidence did, indeed, tend to show that he probably fell into the river, and so came in contact with a specific peril, and there was evidence regarding the depth, the rapidity and the quicksands of the river; but the instruction was objectionable in that it assumed that he was seen in a perilous position of such a character as to afford the basis for speculation as to the probabilities of his extrication.

In *Davie* v. *Briggs*, 97 U. S. 634, Mr. Justice Harlan said: "If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the court or jury may infer that life ceased before the expiration of the seven years."

But it was not thereby ruled that the inference of death might not arise from disappearance under circumstances inconsistent with a continuation of life, even though exposure to some particular peril was not shown, and the evidence indicated that Hunter came within the range of immediate danger.

II. "The court erred in not charging, as requested, that if Hunter at the time of making application for insurance was not a farmer and real estate agent, there could be no recovery."

This relates to the refusal to instruct that "the jury must believe from the evidence that W. A. Hunter, Jr., at the time of making application for insurance to defendant, on which policies of insurance were issued and are herein involved, was at the time he made such application both a farmer and real estate agent, and unless you so believe, you will find for the defendant."

The entire charge of the court is not in the record, and there is nothing to show that the subject of Hunter's answer as to his occupation was not covered by it. Again, Hunter did not say that he was "a farmer and real estate agent," but that his occupation when he made the application was "real estate and farming," and the evidence of the truthfulness of that statement was so plenary, and the evidence from which to infer the contrary was so slight, that we think the refusal was justified on that ground.

Treating the statement of occupation as a warranty, the evidence that Hunter was behind in his payments on the land in Loving County, and that forfeitures were entered in February, 1897, and that he may have been engaged with a photographer for two or three months, even in the summer of 1896, did not so impugn the substantial truth and good faith of his answer as to demand an instruction so worded.

III. "The court erred in admitting the testimony of a repute in the family of Hunter, concerning his death, and the manner thereof."

Hunter had parted with his sister and started for Mentone, December 3, with the intention of returning within a week or ten days. "After he had been gone ten days and did not come back and then two weeks and did not come back," his sister sent a man to make inquiry, who reported that Hunter had not been to Mentone. A few days later she sent again, and received a similar reply. The searching party went out, found the abandoned camp, and reported, and Mrs. Mettler then went herself. She described the condition of things at the camp and the brink of the river. This was December 29, and December 30, the day after she returned, she wrote her father in Ohio about it and that her brother was dead, drowned in the Pecos River, and she testified that her father, brothers and sisters, all believed that this was so, because of what she had written; while they testified that this was the belief of the family, based on the information she furnished. If this testimony should not have been admitted it is difficult to see that it could have been so prejudicial as to be fatal to the verdict, for it amounted to nothing more than the assertion of Mrs. Mettler's belief and the acceptance by the family of that belief as their own. In other words, it cannot be supposed that the jury regarded the evidence as tending to establish the fact of death when it purported only to state Mrs. Mettler's belief and the family's concurrence.

Moreover, in the aspect of showing the entertainment of such belief in good faith the evidence was admissible, if it had been offered at the proper time. Hunter had suddenly disappeared. Search was made, but was not prosecuted after the discovery of the deserted camp. The father was sharply interrogated as to failure to offer reward, to seine the river, to make "effort to find him, or his body." And so was the brother Charles. The theory of the insurance company was that the disappearance was voluntary, and that the conduct of Mrs. Mettler and the family was consistent with the belief that he was yet alive, and was indicative of a combination to defraud the company. This inference the family were entitled to repel by testifying to their conviction of his death. As to the fact of death, it was mere matter of opinion, but as to their belief it was matter of fact showing innocence of fraud. Reasonable inquiry is frequently a prerequisite to the inference of death from disappearance, as well as other effort, but no inquiry or effort was made here after discovery of the camp, because the belief of death and lapse of time rendered it useless. Whether that belief was well founded was for the jury, but that there was such belief was a relevant fact. *New York Life Insurance Company* v. *Hillmon*, 145 U. S. 285, 296; *Wallace* v. *United States*, 162 U. S. 477.

But we do not think the evidence was competent to establish the fact of death, under the circumstances of the case. To illustrate: In *Scott* v.

Ratliffe, 5 Pet. 81, it was held that the testimony of a witness that "she was told that Mr. Madison was dead," was admissible; and in *Secrist* v. *Green*, 3 Wall. 744, 751, it was said that "it is competent to prove death and heirship by reputation." But these and similar rulings and expressions in other cases must be taken in connection with the particular facts and circumstances. In this case no question of pedigree; of birth, marriage, or death as bearing on legitimacy, descent, or relationship; of ancient rights; of past events prior to controversy, was involved; nor was there any pretence that this was evidence of tradition, or historical fact, or general reputation in the community participated in by the family. If evidence of death it would be evidence of the particular fact on which recovery was sought, and inadmissible as such. The ruling was incorrect that: "It is a question for the jury to say whether or not family belief tends to prove his death," although that was qualified by the learned judge charging the jury: "Reputation in his (insured's) family on the part of his father, sisters, and brothers of his death is proper evidence for your consideration, but not the opinion of any one." But, the entire record considered, we are of opinion that it cannot be presumed that the evidence affected the verdict injuriously to defendant, if at all, and, on the contrary, that it affirmatively appears that if it could have had any influence whatever, it was solely from the point of view, which rendered it admissible.

IV. "The statute of Texas, which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent damages, together with reasonable attorney's fees, is in violation of the Constitution of the United States."

The statute referred to is Article 3071 of the Revised Statutes of Texas of 1895, which reads as follows: "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

Article 3072 provided that if any life or health insurance company failed to pay off and satisfy any execution issued on final judgment against it within thirty days of demand of payment, the commissioner of insurance should declare the company's certificate of authority to do business null and void.

These articles were sections of chapter three of Title LVIII, "Insurance," and had been brought forward from the Revised Statutes of 1879, arts. 2953, 2954, chapter three, Title LIII, "Insurance." And the same provisions as to foreign life insurance companies and those incorporated

outside of the State of Texas were contained in the first general insurance statute of Texas, which was passed on May 2, 1874. 2 Paschal's Dig. art. 7116o.

Under this title no insurance company was permitted to do business in Texas without first obtaining a permit from the commissioner of insurance, and compliance with the law was required before permission could be granted, while by the terms of article 3060 the commissioner was required to revoke the certificate of authority to do business in the State in case any company failed for thirty days to pay any execution issued against it on any valid judgment.

The provisions of chapter three embodied many conditions on which business was permitted to be done. By article 3061 it was made unlawful for any person to act within the State as agent or otherwise for any insurance company for soliciting business unless the company had procured authority to do it from the commissioner. Article 3062 provided that any life or health insurance company desiring to do business in the State should furnish a sworn statement to the commissioner as prescribed, which by article 3063 was to be accompanied by a copy of its charter or the law creating it. Article 3064 required the company to designate an agent or attorney in fact on whom service might be had in case of suit, and article 3065 declared that no life or health insurance company incorporated in Texas or any other State should transact business in Texas with less capital than $100,000 actually invested. Article 3066 required insurance companies of other States to make such deposit in Texas as the laws of their home State required of Texas companies doing business there, and article 3067 provided that all foreign companies should deposit $100,000 with the State treasurer before doing business in Texas; which deposit, by article 3068, was to be applied to the payment of judgments in favor of policyholders; but article 3069 provided that it should be sufficient if the deposit required by section 3066 was made in any other State. Article 3070 provided that suits might be brought in any county where loss occurred or where the policyholder resided.

By article 3073 it was made unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or health, and the business of life and health insurance in the State was forbidden to be "in anywise conducted or transacted by any company, which in this or any other State or country, is engaged or concerned in the business of marine, fire, inland or other insurance."

Articles 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3083, 3084 related to marine, fire or inland insurance companies.

Articles 3081, 3082, 3086, 3087, 3089 applied to insurance companies generally.

Article 3092 read: "The provisions of this chapter shall in nowise apply to mutual benefit organizations doing business in this State through lodges or councils, such as the order of chosen friends, knights of honor, or kindred organizations." Article 3096, read: "Nothing in this title shall be construed to affect or in any way apply to mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other State, which have no capital stock, and whose relief funds are created and sustained by assessment made upon the members of said associations in accordance with their several by-laws and regulations;" but an annual statement under oath to the department of insurance was required, and the article concluded: "And should any such benevolent organization refuse or neglect to make an annual report as above required, it shall be deemed an insurance company conducted for profit to its officers and amenable to the laws governing such companies."

Article 3092 was taken from an act of April 3, 1889, entitled "An act to provide for the admission from other States of companies or associations carrying on the business of life or casualty insurance on the assessment or natural premium plan," and certain conditions were affixed to their right to do business in the State, which should not apply to mutual benefit organizations doing business through lodges or councils. Laws 1889, p. 98.

Article 3096 was taken from an act of March 28, 1885, which amended chapter three, Title LIII of the Revised Statutes of 1879, by adding an article thereto couched in similar terms. Laws 1885, p. 62.

In the revision of 1895 these two laws were assigned to their appropriate place under the title of insurance. Such were the conditions which for many years had been imposed on life insurance companies doing business in Texas when the policy sued on in this case was issued. But it is now contended that article 3071 is in conflict with the Constitution of the United States, in that it denies the equal protection of the laws, because the same conditions are not imposed on fire, marine and inland insurance companies; and on mutual benefit and relief organizations doing business through lodges and mutual relief benevolent associations, more particularly the latter.

In other words, the contention is that the classification is so arbitrary, so destitute of reasonable basis, as to be obnoxious to constitutional objection.

In *Union Life Insurance Company* v. *Chowning*, 86 Texas, 654, the Supreme Court of Texas held that the statute in providing for the recovery of damages and attorney's fees was not in violation of the Constitution of Texas or of the United States, and was a valid law. This decision was rendered in May, 1894, but section 2953 of the Revised Statutes of 1879 was the same as section 3071 of the Revised Statutes of 1895, and the acts

of March 28, 1885, and April 3, 1889, were in force, which were subsequently brought forward as sections 3092 and 3096. The Supreme Court held that as all corporations embraced in the classes named were affected alike by the provision, it did not deny the equal protection of the laws; and the court said that the twelve per cent was given as damages for a failure to comply with the contract by payment, and the attorney's fees were allowed as compensation for the costs of collecting the debt. The court was further of opinion that even if the twelve per cent was a penalty for failure to pay when due, there was no provision of the Constitution of Texas which forbade such legislation, and that it was for the legislature to determine when the public was so interested in the enforcement of contracts as to justify that enforcement by penalties.

In *Fidelity &c. Company* v. *Allibone*, 39 S. W. Rep. 632, this ruling was repeated by the Court of Civil Appeals of Texas, and affirmed by the Supreme Court in *Fidelity &c. Company* v. *Allibone*, 90 Tex. 660. Both these courts held that the constitutional question involved was distinguishable from that ruled by this court in *Railway Company* v. *Ellis*, 165 U. S. 150.

In *New York Life Insurance Company* v. *Orlopp*, 61 S. W. Rep. 336, the same conclusion was reiterated, on the ground that the State legislature had the right to provide the terms on which foreign corporations of that class might do business in the State, and that being a valid exercise of such power and right, the statute formed a part of the contract of every life and health insurance company issued and made in Texas, since the date of its enactment. The Circuit Court of Appeals for the Fifth Circuit in *Merchants' Life Association* v. *Yoakum*, 98 Fed. Rep. 251, held the section to be valid on full discussion.

It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in *Railroad Company* v. *Matthews*, 174 U. S. 96, applies rather than that in *Railway Company* v. *Ellis*. The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit, (and we

are not called on to refine as to the distribution of such profits,) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.

Orient Insurance Company v. *Daggs*, 172 U. S. 557; *Waters Pierce Oil Company* v. *Texas*, 177 U. S. 28; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 384, are in point and are decisive.

In *Insurance Company* v. *Warren*, 181 U. S. 73, a section of the Revised Statutes of Ohio provided in effect that no answer to any interrogatory made by the applicant to the policy should bar the right to recovery or be used in evidence on a trial unless it was clearly proved that such answer was wilfully false and was fraudulently made, that it was material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer; and this provision was only applicable to life insurance companies. The constitutionality of that act was upheld by the Supreme Court of Ohio, and this court affirmed its judgment, and in the opinion the language used in *Waters Pierce Oil Company* v. *Texas* was quoted: "A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations." And we added: "It was for the legislature of Ohio to define the public policy of that State in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the State as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we cannot say that the Federal Constitution has been violated in the exercise in this regard by the State of its undoubted power over corporations."

Our conclusion is that the record shows no reversible error, and the judgment is, therefore,

Affirmed.

Mr. Justice BREWER concurred in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 165.—October Term, 1901.

The Fidelity Mutual Life Association of Philadelphia, Plaintiff in Error, *vs.* Jennie M. Mettler. } In error to the Circuit Court of the United States for the Northern District of Texas.

[May 5th 1902.]

Mr. Justice Harlan (with whom concurred Mr. Justice Brown) dissenting.

I cannot assent to that part of the opinion of the court relating to the constitutionality of the Statute of Texas of 1895 which provides that a life or health insurance company, failing to pay a loss within the time specified in the policy, after demand therefor, shall be liable, *in addition* to the amount of the loss, to pay the holder of the policy "twelve per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The operation of the statute is well illustrated in the present case; for, the verdict of the jury was for $15,000 as principal, $2,250 as interest, $5,175 as twelve per cent damages, (of which the plaintiff remitted $3,375), and $2,500 as special attorney's fees for the plaintiff.

The rule embodied in the statute is not made applicable to fire or marine insurance companies, or to any other companies or corporations doing business in Texas. Does not the State by that statute deny to life and health insurance companies, doing business within its limits, the equal protection of the laws which is secured by the Fourteenth Amendment of the Constitution of the United States?

It seems to me that this question must be answered in the affirmative if any regard whatever be had to the principles announced in *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 153, 154.

In that case we had before us a statute, declaring that any person in Texas having "a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railroad corporation operating a railroad in this State, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation, by filing it with

any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, *and in addition thereto all reasonable attorney's fees*, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court and the jury trying the issue."

That statute being in force, an action was brought to recover $50 for a colt killed by the railway company. There was a judgment against the company for the amount claimed, and a special attorney's fee of $10 in favor of the plaintiff was added, as required by the above statute.

The contention in that case was that the statute made such an arbitrary discrimination against railroad companies embraced by its provisions as to bring it within the prohibition of the Fourteenth Amendment. That view was sustained. This court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute." Referring to the Fourteenth Amendment of the Constitution, the court said: "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the laws than it has to individual citizens." Again: "Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unneccessary litigation in respect to

to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained. But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this."

I do not perceive how the present decision can be upheld without disregarding the principles of the Ellis case. If a railroad company sued in Texas upon a claim of less than $50 for killing or injuring stock, cannot be required, when unsuccessful in its defense, to pay a special attorney's fee—no such rule being established in reference to other corporations or individuals, sued for a like amount of money—I cannot understand how life and health insurance companies, alone of all corporations or companies doing business in Texas, can be required to pay special damages and special attorney's fees when unsuccessful in defending suits brought against them. The two statutes are alike in this, that the defendant company or corporation, whether a railroad corporation or a life or health insurance company, even if successful in an action brought against it, could not recover special attorney's fees or special damages against its adversary. Thus the defendant company in a suit brought under either statute is not permitted to appear in court upon terms of equality with the party suing it, and is subjected to special burdens not imposed upon other companies or other corporations refusing to pay money demanded of them.

We are informed by the opinion of this court that the courts in Texas have held that the Ellis case was distinguishable from the present case, and we are referred to *Union Life Ins. Co.* v. *Chowning*, 86 *Texas*, 654; *Fidelity &c. Company* v. *Allebone*, 39 *S. W. Rep.* 632, affirmed in *Fidelity &c. Company* v. *Allebone*, 90 *Tex.* 660, and *New York Life Ins. Co.* v. *Orlopp*, 61 *S. W. Rep.* 336. The first named of those cases was decided more than two years before the Ellis case was determined by this court. The first case in Texas in which the Ellis case was referred to was that of *Fidelity &c. Company* v. *Allebone*. In that case the Court of Civil Appeals of Texas, after referring to certain prior decisions in that State sustaining the constitutionality of the statute here in question, said: "A late

decision of the Supreme Court of the United States, *Railway Co.* v. *Ellis*, construing a somewhat analogous statute of this State, and reversing the decision of our Supreme Court approving its validity, may be at variance with the cases just cited; but, until it is expressly so held either by our own Supreme Court or that of the United States, we will adhere to the decisions already made." The judgment in the last case was affirmed, the Supreme Court of Texas observing nothing more than that the case was "distinguishable" from the Ellis case. Upon what grounds the two cases were distinguishable was not stated. It is a very convenient mode for distinguishing two cases, apparently in conflict, to say nothing more than that they are distinguishable. In *New York Life Ins. Co.* v. *Orlopp*, the statute was sustained upon the ground that the State could prescribe the terms on which foreign insurance companies might do business within its limits.

This court says that the particular liability imposed by the statute in question "*amounted* to one of the *conditions* on which life and health insurance companies were permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions of its own and foreign corporations has been repeatedly recognized by this court."

Of course, speaking generally, a State, may impose conditions on its own and foreign corporations. But will any one say, or has this court ever directly held, that a provision of a State enactment relating to corporations, foreign or domestic, was legally operative or binding if such provision be inconsistent with the Constitution of the United States?

It is one thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a State to admit or license foreign corporations to do business within its limits and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its license or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States, and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business in the State, and, whether constitutional or not, must be respected by the corporation. Corporations created by the several States are necessary to the conduct of the business of the country; and it is a startling proposition that a State may permit a corporation to do business within its limits, and by that act acquire the right to subject the corporation to regulations that may be inconsistent with the supreme law of the land.

In *Insurance Company* v. *Morse*, 20 *Wall.* 445, 455, 456, a statute of Wisconsin, requiring insurance companies of other States to stipulate, as

a condition of their right to do business in that State, that they would not remove into the Federal court any suit brought against them in the State courts, was held invalid not only because it tended to oust the courts of the United States of a jurisdiction conferred upon them by the Constitution, but because it created an obstruction to the exercise of a right granted by that instrument. The court said: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford." The court further said that the right of the insurance company to remove the suit was "denied to it by the State court on the ground that it had made the agreement referred to, and that the statute of the State authorized and required the making of the agreement. We are not able to distinguish this agreement and this requisition, on principle, from a similar one made in the case of an individual citizen of New York. A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior, in this respect, to that of a corporation. The State of Wisconsin can regulate its own corporations and the affairs of its own citizens, in subordination, however, to the Constitution of the United States. The requirement of an agreement like this from their own corporations would be *brutum fulmen*, because they possess no such right under the Constitution of the United States. A foreign citizen, whether natural or corporate, in this respect possesses a right not pertaining to one of her own citizens. There must necessarily be a difference between the statues of the two in this respect."

This question was presented in somewhat different form in *W. W. Cargill Co.* v. *Minnesota*, 180 *U. S.* 452, 468. That was an action by the State to prevent a Wisconsin corporation from operating a warehouse owned by it until it should have obtained a license from the Railroad and Warehouse Commission of Minnesota organized under a statute of that State, and relating to elevators and warehouses. That statute provided: "It shall be unlawful to receive, ship, store or handle any grain in any such elevator or warehouse, unless the owner or owners thereof shall have procured a license therefor from the State Railroad and Warehouse Commission, which license shall be issued for the fee of one dollar per year, and only upon written application under oath, specifying the location of such elevator or warehouse and the name of the person, firm or corporation owning and operating such elevator or warehouse, and the names of all the members of the firm or the names of all the officers of the corporation owning and operating such elevator or warehouse, and all moneys received for such licenses shall be turned over to the State grain inspection fund. Such license shall confer upon the licensee full authority to operate such warehouse or elevator in accordance with the laws of this State and the

rules and regulations prescribed by said Commission, and every person, company or corporation receiving such license *shall be held to have accepted the provisions of this act, and thereby to have agreed to have complied with the same.*"

The Wisconsin corporation defended the suit brought against it upon the ground that the statute there involved was repugnant to the Constitution of the United States. This court said: "We cannot question the power of the State, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits—such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation." Again—and this is most pertinent here—the court said: "The defendant however insists that some of the provisions of the statute are in violation af the Constitution of the United States, and if it obtained the required license, it would be held to have accepted all of its provisions, and (in the words of the statute) 'thereby to have agreed to comply with the same.' The answer to this suggestion is that the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute or with any regulations prescribed by the State Railroad and Warehouse Commission that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State and the valid rules and regulations prescribed by the Commission. If the Commission refused to grant a license, or if it sought to revoke one granted, because the applicant in the one case, or the licensee in the other, refused to comply with statutory provisions or with rules or regulations inconsistent with the Constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

In the case before us, the defendant company was doing business in Texas under a license issued by the State. By accepting such license, the company did not agree to submit to any local regulation that was repugnant to the Constitution of the United States. It could resist the enforcement of any regulation or statutory provision that was inconsistent with rights secured to it by that instrument.

The court says that the ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious. The only reason assigned for that statement is "the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." But the same reasons exist for prompt payment by a fire insurance company when the house which shelters the insured and his family is destroyed by fire. And yet, under

the statute, a fire, marine or inland insurance company, if it resists a claim for loss, is not liable, when its defense is unsuccessful, to pay any special damages or special attorney's fee. It can defend any suit brought against it under the same conditions accorded to individual citizens or to corporate bodies generally. But a different and most arbitrary rule is prescribed for life and health insurance companies. Their good faith in refusing to pay a claim for loss, or in defending an action brought to enforce payment of such a claim, is not taken into account. If, in any case, they do not, within a specified time, pay the amount demanded of them, no matter what may be the reason for its refusal to pay, and if they do not succeed in their defense, they must pay not only the principal sum, with ordinary interest, but, in addition, twelve per cent damages on the amount of the principal, and all reasonable attorney's fees for the prosecution and collection of the loss. Thus the State, in effect, forbids a life or health insurance company to appear in a court of justice and defend a suit brought against it, except subject to the harsh condition that if the jury does not sustain the defense, the company must pay special damages and special attorney's fees that are not exacted from any other defendant, corporate or individual, who may be sued for money.

This is such an arbitrary classification of corporations and such a discrimination against life and health insurance companies as brings the statute within the decision in the Ellis case, which has been often referred to by this court with approval. *Magoun* v. *Illinois Trust and Savings Bank*, 170 *U. S.* 294; *St. Louis Iron Mountain &c.* v. *Paul*, 173 *U. S.* 409; *Nicol* v. *Ames*, 173 *U. S.* 521; *W. W. Cargill Co.* v. *Minn.*, *above cited.*

In my opinion, the statute in question comes within the constitutional prohibition of the denial by a State of the equal protection of the laws and should be held void.

True copy.

Test:

Clerk Supreme Court, U. S.